

(29,135)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1922.

No. 585.

THE PENNSYLVANIA RAILROAD COMPANY, APPELLANT,

vs.

UNITED STATES RAILROAD LABOR BOARD *ET AL.*

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

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1 Pleas in the District Court of the United States for
the Northern District of Illinois, Eastern Division, begun
and held at the United States Court Room, in the City of
Chicago, in said District and Division, before the Honorable
George T. Page, U. S. Circuit Judge for the Seventh Judicial
Circuit holding U. S. Court for the Northern District of Illi-
nois, by assignment, on Thursday, the fourth day of May, in
the year of our Lord one thousand nine hundred and twenty-
two, being one of the days of the regular May Term of said
Court, begun Monday, the first day of May, and of our Inde-
pendence the 146th year.

Present:

Honorable George T. Page, Circuit Judge.

Robert R. Levy, U. S. Marshal.

John H. R. Jamar, Clerk.

Bill of Complaint.

2 IN THE DISTRICT COURT OF THE UNITED STATES
Northern District of Illinois
Eastern Division

The Pennsylvania Railroad Company, Plaintiff, vs. United States Railroad Labor Board, et al., Defendant. } No. 2516

Be it remembered that heretofore, to-wit: on the 9th day of December, 1921, came the above named complainant, by its solicitors, and filed its bill of complaint, as follows:

3 IN THE DISTRICT COURT OF THE UNITED STATES
The Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company, In Equity,
No. 2516.
vs.
United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, Arthur O. Wharton,
Walter L. McMenimen, Horace
Baker, John H. Elliott, Albert
Phillips and Samuel Higgins.

BILL OF COMPLAINT.

LOESCH, SCOFIELD, LOESCH & RICHARDS,
Solicitors for Plaintiff.

C. B. HEISERMAN,
*General Counsel The Pennsylvania
Railroad Company.*

E. H. SENEFF,
*General Solicitor The Pennsylvania
Railroad Company.*

4 IN THE DISTRICT COURT OF THE UNITED STATES
The Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company,
vs.
United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, Arthur O. Wharton,
Walter L. McMenimen, Horace
Baker, John H. Elliott, Albert
Phillips and Samuel Higgins.

In Equity,
No. 2516.

BILL OF COMPLAINT.

The Pennsylvania Railroad Company is a corporation organized and existing under the laws of Pennsylvania and together and in connection with its subsidiaries and affiliated lines operates a system of railroads in the States of Pennsylvania, New York, New Jersey, Delaware, Maryland, District of Columbia, Ohio, Virginia, West Virginia, Indiana, Kentucky, Michigan and Illinois, constituting what is commonly known and designated as the Pennsylvania System and will be hereinafter for convenience called the "Carrier"; that the said carrier has been and is now engaged in the transportation of passengers and freight, both intrastate and interstate, and is subject to the provisions of an Act of Congress approved by the President of the United States on the 28th day of February, 1920, which said Act is known as the Transportation Act, and for convenience and brevity will be so designated herein.

Under and pursuant to the provisions of the Transportation Act, a Railroad Labor Board was created, as provided thereby, and since its creation has functioned as such. That the members of said Labor Board are R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins; that the office of said Railroad Labor Board is in the City of Chicago, Illinois, and that said members of said

Board are respectively temporarily residents of said City of Chicago.

Plaintiff avers that the subject matter here presented involves a question arising under the Constitution and laws of the United States and the amendments to said Constitution and the Act of Congress known as Transportation Act, 1920, particularly Title III thereof; that the amount involved is in excess of \$3,000 exclusive of interest; that this action is of a civil nature and involves the jurisdiction of said Labor Board over contracts between the carrier and its employees, and contracts between the Director General of Railroads and his employees, made and entered into during the period of federal control, and the power and authority of the said Labor Board to extend said contracts after the termination thereof and after the termination of federal control, and the right and power of said Board to prescribe principles, rules and regulations to control the carrier in the management and operation of its railroad and in negotiating with and making contracts with its employees respecting rules and working conditions affecting said carrier and its employees.

That the duties of the Labor Board are declared and fixed by Title III of the Transportation Act of 1920, which concerns "Disputes between carriers and their employees and subordinate officials."

That Section 301 thereof declares it to be the duty of 5 all carriers and their officers, employees and agents, to exert every reasonable effort and to adopt every available means, to avoid any interruption in the operation of any carrier growing out of any dispute between the carrier and its employees or its subordinate officials. That such disputes shall be considered and if possible decided in conference between representatives designated and authorized so to confer by the carriers, or employees, or subordinate officials thereof, directly interested in the dispute. That if any such conference has failed to decide a dispute, it may be referred by the parties thereto to the Board, which, under the provisions of this Title, is authorized to hear and decide the same. That reference of disputes to the Labor Board under said Section are such disputes as have been submitted to and considered in conference but which such conference did not determine.

That the only disputes which said Board may acquire jurisdiction to consider under the provisions of and within the contemplation of said Section 301 are disputes which concern

rules, working conditions, grievances growing out of the administration of rules and working conditions, or wages, and then only after the representatives of carrier and employees have failed to settle such disputes in conference and such disputes have thereafter been referred to the Board for decision by the parties directly interested therein. That the conferences which shall consider and if possible decide disputes between the carrier and its employees or its subordinate officials must be made up of representatives of the carrier and employees, or subordinate officials, who are directly interested in the dispute. That said Section does not confer power upon said Board to prescribe rules to govern the carrier and its employees or its subordinate officials in selecting representatives to confer in the effort to avoid interruption to the operation of the carrier, growing out of disputes between it and its employees or subordinate officials, nor does it confer power upon said Board to prescribe principles to govern and control said carrier and its employees and its subordinate officials in selecting representatives to such conferences. That the Board can only acquire jurisdiction to act under said Section 301 after such representatives have been selected and such conferences have been held and the questions in dispute have been referred to the Board by the parties on account of a failure to agree in such conference but said Board has no authority to prescribe conditions to control the selection of representatives to such conference.

That Section 303 of said Transportation Act makes it the duty of Railroad Boards of Labor Adjustment where the circumstances of the particular case bring the subject matter within the jurisdiction of such Board, to receive such disputes for hearing upon the application of the chief executive of any carrier, or organization of employees, or subordinate officials whose members are directly interested in the dispute, as involves grievances, rules or working conditions which have not been decided as provided in Section 301. That the disputes contemplated by Section 301 are such as involve rules or working conditions or grievances growing out thereof or concerning wages. That under the express provisions of said Section 303 Adjustment Boards acquire jurisdiction to act under said Section only after representatives of carrier and employees have conferred and in conferences failed to agree upon matters in dispute involving rules, working conditions or grievances growing out of said rules or working conditions, but said Adjustment Board has no power or authority

to direct the manner in which carriers and employees shall select representatives to represent them in such conferences or to prescribe any procedure or set of principles to be followed by carriers and employees in selecting representatives.

That no Railroad Board of Labor Adjustment was established by agreement between the carrier plaintiff herein
6 and its employees or otherwise as was authorized by Section 302 of the Transportation Act of 1920.

That Section 307 of said Act provides that where the appropriate Adjustment Board has not been organized under the provisions of Section 302 of said Act, the Labor Board may, upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, or upon a petition signed by not less than one hundred unorganized employees or subordinate officials directly interested in the dispute, or upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing as soon as practicable and with due diligence decide disputes involving grievances, rules or working conditions not decided as provided in Section 301 of said Act and which the appropriate Adjustment Board if in existence would be required, under the provisions of the Act, to receive for hearing and decision under the provisions of Section 303.

Said Section 307 further provides that the Labor Board, upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, or upon a written petition signed by not less than one hundred unorganized employees or subordinate officials directly interested in the dispute, or upon the Labor Board's own motion, if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing and as soon as practicable and with due diligence decide all disputes with respect to wages or salaries of employees or subordinate officials of carriers not decided as provided in said Section 301.

That the only disputes which said Board may acquire jurisdiction to consider under the provisions of said Section 307 are disputes which concern rules, working conditions, and grievances growing out of the administration of such rules and such working conditions or wages, and then only after the representatives of the carrier and employees have failed to settle such dispute in conference as provided in Section

301. Neither said Section nor any other confers power upon or authorizes said Board to prescribe rules to govern the carrier and its employees in selecting representatives to confer in an effort to avoid any interruption to the operation of the carrier growing out of disputes between the carrier and its employees or subordinate officials thereof, nor does it confer power upon said Board to prescribe principles to govern and control said carrier and its employees in selecting representatives to such conference. That matters of procedure preceding and leading up to and culminating in conferences contemplated by Section 301 are not within the jurisdiction of the Labor Board or within its power to control.

That under the provisions of said Sections 301 and 307 said Labor Board acts as a Board of mediation or arbitration and not otherwise and is without power to arbitrate any matter other than such as it may acquire jurisdiction over under the provisions of said Sections as provided therein. That the authority of the Labor Board is limited by the Transportation Act of 1920 to mediate and to arbitrate disputes between representatives of the carrier and employees not decided by them in conference, which involve rules, working conditions or grievances growing out of said rules or working conditions and disputes with reference to wages or salaries of employees or subordinate officials of carriers.

That said Section 301 deals with carriers, employees and subordinate officials whose members are directly interested in the dispute, and not with organizations of employees or labor unions, or confederated systems of labor unions.

That the term "organization of employees" as used in Sections 303 and 307 only apply to and concern applications for hearings before said Adjustment Boards or said

7 Labor Board respectively, as to matters in dispute which have not been settled as provided in Section 301. That Section 301 does not recognize or contemplate "organizations of employees" but concern conferences to settle disputes and provides that such disputes shall be settled if possible "between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof directly interested in the dispute." That the term "organization of employees" as used in said Sections 303 and 307 is not contained in the language of said Section 301 and said Section 301 is the only Section in the Transportation Act which concerns conferences between carriers, employees or subordinate officials who are directly interested in the

dispute. That conferences under said Section 301 precede applications for hearings before an Adjustment Board or the Labor Board and said Sections 303 and 307 do not concern representatives and conferences but concern applications for hearings by Adjustment Boards or the Labor Board where such conferences as are provided for "in said Section 301" have failed to agree. That the term "organization of employees" as used in said Sections 303 and 307 is not synonymous with "labor unions."

That the words "representatives of employees" as used in Section 301 of said Act and "organization of employees" as thereafter used in said Act do not mean "labor unions" or "confederated systems of labor unions" as has been assumed by said Labor Board in its various decisions hereinafter referred to in which said decisions said Board has treated "representatives of employees" and "organization of employees" and "labor unions" as synonymous terms and has insisted therein that the words "representatives of employees" and "organization of employees" is a recognition of labor unions by express terms in said Act. That said Act does not contemplate that a carrier should recognize and deal with labor unions as such and does not by express language or by inference require carriers to deal with officers of labor unions but said Act by its term does require carriers to deal with their employees in an effort to adjust disputes in which they are directly interested.

That said Act does not authorize the Board to require the carrier to confer in such conferences with representatives of its employees who are not actively engaged in its service and does not authorize said Board to determine the qualifications of employees who may vote for representatives to confer with the carrier in conferences contemplated by said Act. That said Act does not empower the Labor Board to promulgate rules to govern carriers and employees in their efforts to adjust questions in dispute, relating to rules, working conditions, grievances growing out thereof, and wages, and does not authorize said Board to promulgate principles or sets of principles by which carrier and employees must be governed in negotiations with reference to such disputes.

That during the period of federal control of railroads the Director General of Railroads negotiated and entered into certain contracts with railroad employees known as and hereinafter referred to as National Agreements; that said agreements by their express terms terminated with the expiration

of federal control on March 1, 1920; that said National Agreements were negotiated with the officers and heads of certain labor organizations, many of which, if not all, were affiliated with the American Federation of Labor, and said National Agreements and each thereof related to rules and working conditions affecting said employees.

That notwithstanding the limitations imposed upon said Labor Board by said Transportation Act, it assumed jurisdiction to administer National Agreements which existed under federal railroad control but which had expired by their express terms before said Labor Board was created.

8 That at the termination of federal control on March 1, 1920, there were pending with the Director General many applications for increases in wages on behalf of railroad employees all of which employees were represented in said applications by the labor unions to which they respectively belonged. Upon the termination of federal control and said National Agreements and upon the organization of said Labor Board as provided by the Transportation Act, 1920, said various applications for increase in wages were referred to said Labor Board and said Board assumed jurisdiction thereover and entered upon hearings respecting the same. Notwithstanding the fact that said National Agreements had expired by their express terms with the termination of federal control, upon such hearing of said applications for increase in wages so referred to the Labor Board as aforesaid, said National Agreements were repeatedly recognized, referred to and considered by said Labor Board upon the question of wage increases against the protests and objections of the railroads, including complainant, represented by a Managers' Committee, and against the objection that said National Agreements were not before the Board for consideration; that said Agreements were not existing agreements and that the operation, effect and force thereof had expired upon the termination of federal control.

That thereafter on July 20, 1920, said Board rendered a decision on said applications for increase in wages (Decision No. 2, Dockets 1, 2 and 3) thereby increasing the wages of all railroad employees, including the employees of the carrier and its subsidiary and affiliated lines, and making said increase in wages effective as of March 1, 1920. Notwithstanding the fact that the National Agreements affecting rules, working conditions and agreements in force during federal control had terminated and expired under their express terms

with the termination of federal control to enable said Labor Board to act in the premises, it assumed that said agreements contained in full force and effect, as appears from the following, quoted from said opinion:

"The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration and determination of the questions pertaining to the continuation or modification of such working conditions and agreements, no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions and agreements, further hearings will be had at the earliest practicable date and decisions therein will be rendered as soon as adequate consideration can be given."

That the rules, conditions and agreements there referred to are the rules, conditions and agreements embodied in said National Agreements, which by their terms had expired on March 1, 1920.

That pursuant to the announcement in said Decision No. 2 that all questions with reference to the continuation or modification of rules, working conditions and requirements would be heard at an early day and decisions rendered thereafter as soon as adequate consideration could be given the subject matter, the Labor Board on December 8, 1920, notified labor unions and carriers to present evidence and arguments on the alleged dispute growing out of rules and working conditions embodied in said National Agreements, notwithstanding the fact that said National Agreements were no longer in force. That after taking evidence and hearing arguments respecting said rules and working conditions, said Labor Board on April 14, 1921, without warrant or authority of law, promulgated its Decision No. 119 (Dockets 1, 2 and 3), terminating said National Agreements on July 1, 1921, which agreements it had theretofore undertaken to perpetuate in said Decision No. 2, and without warrant or authority called

9 upon the officers and system organization employees of each carrier to confer and decide so much of the dispute relating to rules and working conditions as it might be possible for them to decide in conference, although no dispute as to rules and working conditions had reached the

Board under the Transportation Act of 1920, as appears from the following quoted from said decision:

"2. The Labor Board calls upon the officers and system organizations of employees of each carrier, parties hereto, to designate and authorize representatives to confer and to decide so much of this dispute relating to rules and working conditions as it may be possible for them to decide. Such conferences shall begin at the earliest possible date. Such conferences will keep the Labor Board informed of final agreements and disagreements, to the end that this Board may know prior to July 1, 1921, what portion of the dispute has been decided. The Labor Board reserves the right to terminate its direction of Decision No. 2 at an earlier date than July 1st with regard to any class of employees of any carrier if it shall have reason to believe that such class of employees is unduly delaying the progress of the negotiations. The Board also reserves the right to stay the termination of the said direction to a date beyond July 1, 1921, if it shall have reason to believe that any carrier is unduly delaying the progress of the negotiations. Rules agreed to by such conference should be consistent with the principles set forth in Exhibit B attached hereto."

That Exhibit B referred to and attached to the Decision No. 119 is in words and figures as follows:

Principles.

1.

An obligation rests upon management, upon each organization of employees and upon each employee to render honest, efficient and economical service to the carrier serving the public.

2.

The spirit of co-operation between management and employees being essential to efficient operation, both parties will so conduct themselves as to promote this spirit.

3.

Management having the responsibility for safe, efficient and economical operation, the rules will not be subversive of necessary discipline.

4.

The right of railway employees to organize for lawful objects shall not be denied, interfered with or obstructed.

5.

The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

6.

No discrimination shall be practiced by management as between members and non-members of organizations or as between members of different organizations, nor shall members of organizations discriminate against non-members or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the legitimate activities of carriers should not be practiced.

7.

The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with, if and when, the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

8.

No employees should be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this principle. At a reasonable time prior to the hearing he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by a counsel of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

9.

Proper classification of employees and a reasonable definition of the work to be done by each class for which just and reasonable wages are to be paid is necessary, but shall not unduly impose uneconomical conditions upon the carriers.

10.

Regularity of hours or days during which the employee is to serve or hold himself in readiness to serve is desirable.

11.

The principle of seniority long applied to the railroad service is sound and should be adhered to. It should be so applied as not to cause undue impairment of the service.

12.

The Board approves the principle of the eight-hour day, but believes it should be limited to work requiring practically continuous application during eight hours. For eight hours' pay eight hours' work should be performed by all railroad employees except engine and train service employees, regulated by the Adamson Act, who are paid generally on a mileage basis as well as on an hourly basis.

13.

The health and safety of employees should be reasonably protected.

14.

The carriers and the several crafts and classes of railroad employees have a substantial interest in the competency of apprentices or persons under training. Opportunity to learn any craft or occupation shall not be unduly restricted.

15.

The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present

grievances either in person or by representatives of their own choice.

16.

Employees called or required to report for work, and reporting but not used shall be paid reasonable compensation therefor.

That thereafter, on June 27, 1921, without authority or warrant of law, said Labor Board issued what is designated "Addendum No. 2 to Decision No. 119 (Dockets 1, 2 and 3)" modifying Decision No. 119 with respect to rules governing compensation for overtime and continuing certain other rules established by or under the authority of the United States Railroad Administration, thus further professedly continuing and perpetuating in force and effect said national agreements which by their express terms ceased to exist as aforesaid on the termination of federal control.

That while not conceding that the Labor Board had at any time acquired jurisdiction over said national agreements, or that it had any right or power to revive and perpetuate said national agreements, as it did in said Decision No. 2, or that it had power to continue them in full force and effect until July 1, 1921, as it did in said Decision No. 119, or that it had power to prescribe said principles which it attached to said Decision No. 119, or that it had power to issue 11 Addendum No. 2 to said Decision No. 119, plaintiff endeavored to comply with said Decision and said principles.

That plaintiff, though not recognizing any obligation so to do, called into conference its several classes of employees with a view to negotiating with each class, respectively, rules and working conditions to govern and control the relations between it and its employees, in lieu of said national agreements which had ceased to exist, and to which said national agreements the carrier was in no wise a party.

Plaintiff avers that there is upon the lines of the carrier a labor union in its shop crafts known as System Federation No. 90, which System Federation is affiliated with and is a branch of the Railway Employees Department of the American Federation of Labor. That the officers of said System Federation No. 90 declined to co-operate with the carrier in the selection of individual employees to act as committees to negotiate rules and working conditions with the carrier. That said officers contended that the employees in the several shop crafts of the carrier belonging to System Federation No. 90

had elected general chairmen and that such general chairmen, under the rules of the said labor union, were authorized to negotiate with the carrier on matters respecting rules and working conditions to take the place of said national agreements. That thereupon the officers of said System Federation No. 90 proposed to confer with the carrier and to negotiate rules in accordance with Decision No. 119 of the Railroad Labor Board. That the carrier refused to negotiate with such officers, but while recognizing no legal obligation so to do, offered to negotiate with committees of its employees composed of men actually engaged in its service, regardless of whether the members of such committees were or were not members of System Federation No. 90.

Plaintiff shows to the court that it has been its policy since the termination of federal control to re-establish with its own employees a harmonious relationship, bearing in mind that honest, efficient and economical operation of its lines can be secured only by close and unrestricted co-operation by the management, and its employees. To that end it determined that all classes of employees should have a voice in the administration of matters affecting their welfare through representatives of their own selection, provided that such representatives, whether union or non-union men, should be actual employees. In pursuance of this policy conferences were held with representatives duly elected, authorized and designated by employees in the several crafts. The officers of said System Federation No. 90 declined to co-operate with the carrier in the selection of such committees to represent employees with whom the carrier might negotiate rules and working conditions. Thereupon the carrier, with the co-operation of its employees in the shop crafts, though recognizing no legal obligation so to do, prepared and distributed to such employees a ballot upon which each employee might designate employee representatives to confer with it as to rules and working conditions. That after the distribution of such ballots the officers of System Federation No. 90 distributed ballots to all such shop craft employees and warned each such employee not to use the ballot furnished by the carrier and directed each such employee to vote for System Federation No. 90 as his representative for such conference. That the carrier recognized the result of the election which it conducted and thereupon entered into conference as to rules and working conditions with the employee representatives so chosen. As a result of such conferences and similar conferences with employee representatives of

other classes of employees, plaintiff has entered into contracts with approximately 117,176 employees out of a total of approximately 176,000 interested in rules and working conditions. That said contracts are now in full force and 12 effect, and by their terms the parties thereto have acquired mutual rights and assumed mutual obligations.

That thereafter said System Federation No. 90, on June 20, 1921, by B. M. Jewell, President Railway Employees Department, American Federation of Labor, filed with the Labor Board an application for decision, complaining that the carrier had refused to negotiate rules and working conditions with officers of System Federation No. 90 and was proceeding to negotiate rules and working conditions with committees selected in the manner aforesaid, and by reason of the premises had violated said Decision No. 119 and particularly paragraph 2 thereof and Principles 5 and 15 attached to said Decision No. 119.

That said Board heard said complaint on July 8, 1921; that the carrier on said hearing insisted, and now avers, that the Board had no power to perpetuate said national agreements as it did in its Decision No. 2; that it had no power to abrogate the same, as it did in its Decision No. 119; that it had no power to prescribe said principles which it attached to said Decision No. 119; that it had no power in Addendum No. 2 to Decision No. 119 to reverse itself and to restore said national agreements conditionally as it there did, and that it had no right or power to dictate to the carrier and its employees the manner in which said rules and working conditions should be negotiated, nor the manner in which representatives of employees or others should be selected for such negotiations; and that as to procedure leading to such negotiations, the Labor Board had no duty, or power of direction or control.

That said paragraph 2 of said Decision No. 119 without warrant or authority of law directed that officers and System Organizations of employees of each carrier, parties thereto, should designate and authorize representatives to confer and to decide upon the dispute relating to rules and working conditions, and the plaintiff herein, denied, and denies here, the power of the Labor Board to direct the carrier to negotiate with officers of System Organizations concerning rules and working conditions; and plaintiff insisted there, and insists here, that it is the right of employees to select individual employee representatives to represent them in conferences relating to said subject matter. Plaintiff further denied before said Board, and denies here, that said Board has power or

authority to require the carrier to negotiate with organization representatives, whether or not such representatives are employees of the particular carrier, and denied, and denies here, that the said Board has any authority to promulgate and enforce said Principles No. 5 and No. 15 to the effect that the majority of any craft of class of employees shall have the right to determine what organization shall represent its members, and that such organization shall have the right to make an agreement which shall apply to and include all employees in such craft or class.

That thereafter on July 26, 1921, the Board rendered its Decision No. 218 (Docket 404), which was released on Monday, August 1, 1921, and without warrant of law or authority arising from either the letter or the spirit of said Transportation Act, 1920, under which it was constituted, decided that neither the election held by the carrier nor the election held by System Federation No. 90 was held in compliance with the requirements of the Transportation Act of 1920, and in said Decision No. 218 the Board ignored its Decision No. 119 and the principles enumerated therein, failure to observe which by the carrier, as alleged, was the cause of the complaint that the Board was then passing upon. The following is quoted from said Decision No. 218:

"There is no question of the closed or open shop involved in this dispute and no other real matter of principle. The question involved is merely one of procedure."

Notwithstanding the dispute as found by the Labor 13 Board concerned only a matter of procedure over which said Board had no jurisdiction, it nevertheless assumed jurisdiction over such matter of procedure and without warrant or authority declared said elections illegal and the rules negotiated void and of no effect, and ordered new elections as appears from the following quoted from the opinion:

"Under the authority of the Transportation Act as hereinbefore cited, the Labor Board hereby declares that both of said elections on the Pennsylvania System were illegal and that rules negotiated by the alleged representatives selected by either ballot will be void and of no effect, and orders that a new election be held."

The said Board having declared the dispute to be one of procedure only and not of principle, the carriers avers that the Board has no power to enforce and set up its judgment against the judgment of the carrier, or to distort a matter of procedure into a dispute within the purview of said Sections 301 and 307, which sections contemplate matters of sub-

stance. That reduction of wages and grievances growing out of unfair, unreasonable, burdensome working rules and conditions are the matters comprehended by the Transportation Act, 1920, as prolific of disputes which might interrupt commerce, to prevent which the Labor Board was created.

Plaintiff avers that the said Transportation Act does not confer power upon the Board to invade the domain of management and to decide questions of procedure, and it denies that Congress by the Transportation Act, 1920, intended to divest the carrier of its constitutional and lawful right to control in matters of procedure and management and to vest the same in said Board.

Plaintiff avers that the Transportation Act does not confer upon the Labor Board power to require carriers and employees to hold elections for any purpose or to declare any election which a carrier and its employees may conduct void, or to prescribe the procedure to be followed by carrier and employees in conducting said election.

Plaintiff denies the power of the Labor Board to prescribe rules and conditions to determine what employees are eligible to vote, as it did in Decision No. 218, and insists that it has the sole power when elections are to be held, to determine franchise rights and accord the same only to employees actually in its service, or absent upon leave.

Plaintiff denies the power of the Board to compel conferences between it and its employees or to dictate the representatives of its employees with whom it shall confer if any conference is held, or to prescribe rules under which representatives of organized or unorganized labor shall be selected.

Plaintiff avers that it has the lawful right to establish rules and working conditions in the first instance either with or without holding conferences with its employees, and if the rules and working conditions so established are believed to be unreasonable and unjust, such rules and working conditions may, under the terms of said Act, be taken to said Labor Board and the matter submitted to the arbitration of said Board.

Notwithstanding the foregoing, he said Labor Board without warrant or authority of law declared the election so conducted by the carrier illegal; that rules negotiated by representatives elected at said election were void and of no effect, directed that another election be held, ordered that a choice of the majority of each of the respective crafts within the purview of said decision should govern and control; that

all employees of the carrier with the purview of said decision who had been laid off or furloughed and who were entitled to service with the carrier under the seniority rules when the force was restored to what was generally recognized as constituting a normal force, if accessible, should be given a ballot and permitted to vote; that a conference should be held on or before August 10, 1921, at such place as the carrier might designate, between the duly authorized representatives of the carrier and the duly authorized representatives of System Federation No. 90, the duly authorized representatives of any other organization whose by-laws or constitution established the fact that such organization was functioning as a labor organization and the duly authorized representatives of one hundred or more unorganized employees selected by the crafts within the purview of said decision, and prescribed a form of ballot to be used at such election, a copy of which ballot is in words and figures as follows:

PENNSYLVANIA SYSTEM**Machinists, Apprentices, and Helpers
Official Ballot.****Form
ball**

A dispute exists between the carrier and System Federation No. 90 of the Railway Employees' Department, of the A. F. of L., as to who the employees, in the craft above named, desire to be represented by in the conference to negotiate rules and working conditions.

The machinists, apprentices, and helpers, irrespective of membership or nonmembership in any organization, are therefore to be given an opportunity to designate, by a majority vote, the representation of their choice, as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose.

Those who desire to be represented by System Federation No. 90, Railway Employes' Department of the A. F. of L., mark an X in this square

Those who desire to be represented by The American Federation of Railroad Workers, mark an X in this square

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here and mark an X in this square

Place employed

Craft

Actually working

Laid off or furloughed

Name of voter

That said Labor Board directed that after such election had been held and the ballots had been canvassed, the result thereof should be reported to the Board, and the representatives of the carrier and of the employees so selected should thereupon proceed with negotiations concerning rules.

That thereafter, on August 5, 1921, said Labor Board issued Addendum No. 1 to Decision No. 218 (Docket 404), which said Addendum is in words and figures as follows:

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois,

August 5, 1921.

Addendum No. 1 to Decision No. 218 (Docket 404)

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Decision No. 218 (Docket 404)—Railway Employes' Department, A. F. of L. (Federated Shop Crafts) vs. Pennsylvania System.

Entry—Modifying Decision No. 218 to the extent that the method of election of representatives of employees shall be by secret ballot.

In Decision No. 218, the Railroad Labor Board, in ordering an election on the Pennsylvania System, for the selection of representatives of the class of employees involved, to con-

fer with the carrier on rules and working conditions, directed that each employee voting should show on his ballot his name, craft, place of employment and whether working or furloughed, and should then seal and forward the ballot to the proper committee.

The purpose of this provision was to make it easy to check up the voters and eliminate any ballots cast by those not eligible to vote, this being the established method of taking a ballot among the railway labor organizations.

The attention of the Board has since been called to the fact that this method of balloting in this instance would be objectionable, because there is such conflict of interest as renders a secret ballot desirable.

The Labor Board therefore orders that said Decision No. 218 be modified to the extent that the representatives of 15 the carrier and the employees, in their conference which the Board has directed to be held on or before August 10, 1921, be authorized to make such changes in said plan of election as are necessary to preserve the absolute secrecy of the ballot.

By order of

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON,

Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

That thereafter plaintiff filed an application with said Board to vacate said Decision No. 218, and in and by said application plaintiff renewed its objection to the jurisdiction of the Board to extend the operation of said National Agreements; again insisted that said agreements terminated by their own terms with the termination of federal control; that the Board had no power to prescribe principles to govern carrier and employee in making agreements covering working rules and conditions; that the Board, having declared in said Decision No. 218 that the question of jurisdiction was not of prime importance, and that the question involved did not concern a closed or open shop or any other real matter of principle but involved procedure only, had no jurisdiction of any question of procedure, but under said Act had jurisdiction only of such disputes as involved substance, merit, real grievances, unfair, unreasonable, burdensome working

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rules and conditions contemplated by the Transportation Act as disputes which might interrupt commerce; that the Board had no power or authority to prescribe an election, or any other method, by which the carrier should ascertain who constitute the authorized representatives of its employees and declared that it could not accept as advisory or be controlled by the rules and conditions set forth in said decision. The plaintiff stated in the said application that it would accord franchise rights to such of its employees as are in its active service, or absent upon leave, but would not extend voting qualifications to men who had been laid off, or furloughed, or who might be engaged in other occupations, or who might not return to the service of the carrier; that the Board was without power or authority to compel a conference or to prescribe what representatives of its employees it should confer with, and that the Board was without power or authority to prescribe rules for ascertaining the representative capacity of the spokesmen for unorganized labor; that approximately 117,000 employees out of 176,000 thereof by vote or otherwise had expressed a desire to negotiate rules and working conditions through employee representatives and contracts respecting rules and working conditions had accordingly been negotiated and entered into between the carrier and the representatives of approximately 150,000 employees. Plaintiff in said application further stated, that after said decision had been announced, it had held conferences with representatives of the several crafts with whom contracts had been made for the purpose of ascertaining whether or not, in the light of said decision, said employees were satisfied with the manner in which their representatives had been selected and with the rules and working conditions which had been negotiated and entered into; that as a result of said conferences said employees, through their said representatives, expressed their satisfaction not only with the manner of selecting representatives but with the rules and working conditions embodied in said agreements as well; that thereafter, on August 22, 1921, said carrier held a general conference with representatives of employees who had been selected by ballot in accordance with the plan of election submitted by the carrier after the publication of the Board's Decision No. 119, to which conference 250 representatives of System Federation No. 90 of the American Federation of Labor, employed by the carrier, were invited, but acting

16 under instructions from the President of System Federation No. 90 only a few of such representatives of System Federation No. 90 attended said conference; that in the election conducted by the carrier after said Decision No. 119 had been announced, many of the employees elected thereby were union men and that the entire delegation of representatives so selected in several of the crafts were union men; that the employee representatives with whom such conference was held again signified their approval of and their satisfaction with the plans and purposes of the carrier and the contracts which had been duly negotiated and executed; that the contracts so negotiated and executed were in full force and effect, and that by their terms the parties thereto had acquired mutual rights and assumed mutual obligations, and if the carrier complied with the decision of the Board said contracts would be void and of no effect, to the great and irreparable injury of the carrier and its employees, parties to said contracts; that the rights of employees who were not parties to said contracts and who did not desire to be bound by them were not impaired inasmuch as such employees might invoke the aid of the Board if they were of opinion that the rules and working conditions so negotiated and contained in said contracts and in force upon the carrier's lines of railroad were unfair and unreasonable.

In consideration of the matters and things in said application set out the carrier, as aforesaid, asked the Board to vacate and set aside its said Decision No. 218; also asked it to hold that pursuant to the Transportation Act the carrier had the lawful right to establish rules and working conditions in the first instance, either with or without first holding conferences with its employees; and that said contracts respecting rules and working conditions theretofore negotiated and entered into by the carrier and its employees in the shop crafts are in full force and effect without further action on the part of the carrier and its employees in said shop crafts.

The carrier further petitioned the Board to grant it an oral hearing upon said application to vacate, at which hearing it would offer evidence to support the allegations of fact contained in its application to vacate.

That thereafter, on September 16, 1921, said Labor Board entered an order on the carrier's petition to vacate and set aside Decision No. 218 (Docket No. 404) and to grant the carrier an oral hearing on said application to vacate. The order so entered was as follows:

"It is the order of the Labor Board that the carrier's request for an oral hearing of its petition shall be granted for the purpose of permitting the carrier to present its views on the following matters:

1. The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements and rules and working conditions.

2. The question of how the representative capacity of the spokesman of unorganized employees shall be ascertained.

3. The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class.

Said hearing is set for Monday, September 26, 1921, 10 A. M.

The Board declines to grant a hearing upon the other questions raised in carrier's petition for reasons hereinbefore set out."

That in its said application to vacate the carrier denied the power of the Board to dictate an election or any method through which the carrier should determine who are the authorized representatives of its employees. The carrier, denying such power, declined to submit itself to the jurisdiction of the Board by submitting further argument relative to the subject matter of said paragraphs 1 and 2.

That as to paragraph 3 of said Decision the carrier 17 averred in its said application to vacate, that rules and working conditions had been negotiated and agreed upon between the carrier and the representatives of approximately 150,000 of its employees and the carrier there denied and here denies the right or power of the Board to set such agreements aside.

Plaintiff avers that the subject matter of said paragraph 3 relates to mere procedure and denies that there is power in the Board to dictate procedure. The carrier denies that the Board has power to prevent it from exercising its lawful right to deal with its own employees without the intervention or interference of individuals or organizations whose manifest purpose is the denial of the fundamental right of the employer and the employees to deal in the first instance directly with each other in respect to rules, working conditions and wages.

That in and by said Decision said Board refused the carrier's request for an oral hearing upon the questions of substance urged in the carrier's said application to vacate. Therefore the carrier declined to be heard on questions of procedure and management over which the Board was not authorized by the Transportation Act to assume jurisdiction.

Plaintiff avers that the said unauthorized decision and order of said Board as contained in said Decision 218 and the said order of the Labor Board so entered on the carrier's application to vacate said Decision 218 will tend to engender strife between the carrier and System Federation No. 90. That said decision and order will introduce into the controversy a question of open and closed shop between carrier and labor unions notwithstanding the Labor Board in Decision 218 held that no question of open or closed shop was involved in the controversy.

That the order of said Board entered in the carrier's application for vacation of Decision 218 was not responsive to said application or to the matters and things contained therein. That said Board refused to grant a hearing on said application at which the carrier might show that the great majority of its employees are satisfied with the manner in which employee representatives were selected and with the rules and working conditions negotiated between such representatives and the carrier, but said Board granted a further hearing restricted to matters over which the carrier maintains the Board is without jurisdiction.

Plaintiff shows to the court that Section 313 of said Transportation Act empowers the Labor Board, whenever it has reason to believe that a decision of the Board has been violated by any carrier, or employee, or subordinate official or organization thereof, upon its own motion, after due notice to all persons directly interested in such violation and hearing thereon, to determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine. The purpose and intent of said provision is to induce and impel, through the coercive force of public opinion, compliance by any carrier or person affected by an order of the Labor Board with the terms and provisions of the same, and plaintiff avers that it is neither equitable nor just that it should be subjected to such coercive influence in respect to any order of the Board which the Board was without authority to make, and that consequently the Board should be restrained by an order of this court from

subjecting plaintiff to the coercive process prescribed by the said provision of said Transportation Act in respect to the order which plaintiff has declined to obey because the subject matter thereof was not within the jurisdiction of the said Board.

Plaintiff avers that if said Labor Board determines and makes public, as the carrier is informed and believes it intends to do, that the carrier has violated the order as to procedure promulgated by it in Decision 218 affecting alleged and assumed rights of employees, the effect of said determination and publication upon carrier's relations with its 18 employees will be of such a nature as to create dissatisfaction and discontent among its employees and will tend to interrupt commerce, thereby inducing the very condition which the Transportation Act was intended to obviate. That such determination and publication will produce dissatisfaction among carrier's employees as to the rules and working conditions so as aforesaid negotiated and agreed upon and will result in the repudiation of contracts entered into as aforesaid between the employees and carrier without regard to the justness and reasonableness of such rules and working conditions. Plaintiff states that it is informed and believes, and so states the fact to be, that the Labor Board has determined under said Section 313 that the action of the carrier in refusing to be guided by the terms of said Decision 218 as to matters of procedure promulgated therein is a violation of its said decision, and will publish the same in such manner as to seriously and irreparably injure the property of the plaintiff. Plaintiff avers that the power and authority conferred upon the Labor Board by said Section 313, if exercised, will amount to the imposition of a penalty and plaintiff avers that the Board is without power to impose such penalty upon plaintiff because of its refusal to comply with the Board's Decision 218.

Plaintiff avers that it has no adequate remedy at law in the premises.

Plaintiff avers that unless the Labor Board is enjoined from publishing that in resisting its dictation and control as to matters of procedure and management the carrier has violated its decision, the Labor Board will characterize the plaintiff as a violator of law notwithstanding the fact that said Labor Board was without jurisdiction to render such decision and to make such publication; and said Labor Board will thereby interfere with the carrier and its employees in the

performance of their mutual obligations and agreements under the terms of said contracts so negotiated and agreed to, to the great and irreparable injury to the property of both the said carrier and its said employees. That employees, relying upon the publication by the said Labor Board that plaintiff has violated its said Decision 218, and because of the uncertainty created thereby as to the rules and working conditions in effect, will sue the carrier in cases where the rules and working conditions, so negotiated and now in operation, result in the loss of income to said employees, although they are receiving compensating advantages in the application of said rules and working conditions; thus resulting in a multiplicity of suits.

Plaintiff further avers that the publication of the Board's unauthorized decision to the effect that the carrier has violated said Decision No. 218 will brand the carrier before the public with having defied said Labor Board and will thus hold the carrier up to public contumacy, scorn and disapprobation, with the consequent loss of public esteem and inevitable disorganization of its employees and irreparable loss and damage to its property and transportation system.

Plaintiff further shows to the court that said Transportation Act of 1920 under which said Board was organized does not provide for an appeal from decisions rendered by the said Board, and unless this court enjoins the said Board in accordance with the prayer herein, that there is no course known to the law which the carrier can follow to prevent such irreparable injury to its property and the unauthorized injustice which said Board will impose upon it as aforesaid.

Plaintiff shows to the court that as to the matters and things hereinbefore set out in this bill and in each paragraph thereof it has in contemplation a construction of the various sections of said Title III and the application of the terms and meaning of said sections as so construed to said matters and things without regard to the constitutionality of Title III

of said Act, or any part thereof, and plaintiff avers that
19 it does not admit by anything contained in this bill that
said Title III of said Act or any section thereof is constitutional.

Plaintiff shows to the court that the construction of said Act by the said Labor Board authorizes said Board to assume the control of railroad management and procedure, as is manifested by Decision No. 218 of said Railroad Labor Board, in which it holds that the election under which the carriers

employee representatives were chosen to negotiate rules and working conditions on behalf of its employees was illegal and that the rules and working conditions agreed upon by such representatives and the carrier were likewise void and of no effect.

Plaintiff denies that the Transportation Act, 1920, or Title III thereof, or any section of said title, authorizes said Board so to declare said election illegal and the rules and working conditions void and of no effect.

Plaintiff avers that if upon consideration of said Transportation Act and said Title III, and upon a construction of said Title III and each section thereof, it should be held by this Honorable Court that in and by the terms of said Act said Board has power to hold that said election, and the said rules and working conditions negotiated by the employees' representatives, so elected, and the carrier, were respectively illegal, void and of no effect, said Title III of said Transportation Act and each section thereof is unconstitutional and repugnant to the Fifth Amendment to the Constitution of the United States.

Plaintiff further shows that under Section 313 of said Transportation Act, said Labor Board is authorized by its terms to publish any violation of any of its decisions in such manner as it shall determine. Plaintiff avers that the authority so to publish violations of decisions is confined to such decisions as relate to rules, working conditions and wages, which are within the jurisdiction of the said Labor Board under the terms of said Act, and does not include matters of procedure and railway management which, plaintiff avers, are not within the jurisdiction of said Labor Board. Plaintiff further avers that in and by said Decision No. 218 said Labor Board, without authority of law, assumes to control matters of railway management and procedure and declares such elections so held and said contracts so entered into are respectively illegal, void and of no effect, and orders the plaintiff to conduct another election in conformity to the provisions of said Decision. Plaintiff shows that said Labor Board is without jurisdiction to declare said election illegal and said contracts void and of no effect, and for that reason plaintiff has refused, and now refuses, to conform to the provision of said Decision. Plaintiff avers that notwithstanding the said Labor Board is without jurisdiction to require carrier to hold another election and to hold that said election is illegal and said contracts void and of no effect, said Board

nevertheless threatens, and unless it is restrained by order of this court, will publish the plaintiff as a violator of said Decision, under the provisions of said Section 313, thereby stigmatizing it as a violator of the law, and thereby punishing the plaintiff without warrant or authority.

Plaintiff avers that if upon construing said Title III this honorable court should hold that said Labor Board was authorized by said title to assume jurisdiction over the subject of procedure and railroad management by requiring the carrier and its employees to hold another election, and to hold contracts made by it void and of no effect, and, in the event of failure on the part of the carrier to comply with the decision of the Board entered under such assumed authority, to exercise the coercive and plenary powers granted to it by Section 313, then said Title III and each and every section thereof is unconstitutional and repugnant to Section 1 of Article I of the Constitution of the United States; to Section 1 of Article III of the Constitution of the United States, 20 and to the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.

Forasmuch, therefore, as plaintiff is without remedy except in a court of equity, where matters of this character are properly cognizable and relievable, and to the end that the said Railroad Labor Board and the said R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, who are made parties defendant to this bill, may be required to make full and direct answers thereto, but not under oath, answer under oath being hereby waived, to all and singular the matters and things hereinbefore set out; that an injunction issue herein restraining the said Railroad Labor Board and the said R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, and each of them, from prescribing any rule, or set of rules, or any regulation, or set of regulations, relating to rules, working conditions or wages without having first acquired jurisdiction thereof as provided in said Act; from assuming to and continuing to dictate the procedure whereby and whereunder representatives to conferences contemplated by said Section 301 of said Act shall be selected; from requiring and continuing to require carriers to hold conferences with its employees; from holding and continuing to hold that

plaintiff must conduct elections to determine who shall represent its employees in conference with it; from promulgating and continuing to promulgate principles to control the carrier, employees and subordinate officials thereof in selecting representatives for such conferences; from assuming to determine and continuing to determine who are eligible to represent the carriers, employees or subordinate officials in conferences to be held under the provisions of Section 301 of said Act; from assuming to dictate and continuing to dictate the qualifications which will render persons eligible to vote at any such election; from dictating and continuing to dictate procedure to govern and control in the selection of representatives of carriers, employees or subordinate officials, to take part as representatives in such conferences as are provided for in Section 301 of said Transportation Act; from functioning as a Board under the provisions of said Transportation Act as to any matter in dispute under the terms of said Act until after the conference contemplated by said Section 301 has been held, or until jurisdiction of such dispute has been established as prescribed by said Act; from holding and continuing to hold that the said election at which its employees selected representatives to confer with it as to questions involving rules regulations and working conditions was illegal; from holding and continuing to hold that the rules, regulations and working conditions agreed upon between representatives of its employees so elected, and representatives of the carrier, in conference, and which agreements were reduced to contracts and are now in force and operation, are void and of no effect; from ordering that another election be held to select representatives of employees to confer with complainant in accordance with procedure prescribed by the Board; from determining that plaintiff has violated or has refused to conform to Decision No. 119 and principle attached thereto or Decision No. 218 of the Labor Board, or either thereof, and from publishing its said decision in any manner; from taking any further action of any kind tending towards the enforcement of its Decision 218; from taking any further action of any kind tending towards the enforcement of its Decision 119; from taking any action of any kind to penalize carrier for failing and refusing to comply with its said Decision 218; from taking any action of any kind to penalize carrier for failing and refusing to comply with its said Decision 119; and that complainant may have such fur-

ther and other relief in the premises as the nature of
21 its case shall require and to your Honors shall seem meet;
that a temporary injunction be issued herein against said
parties defendant hereto, and each thereof, restraining them
as herein prayed and that upon the final order of this court
herein that said defendants, and each of them, be perpetually
enjoined in manner and form as prayed for herein.

May It Please Your Honors to grant the writ of summons
in chancery, directed to the Marshal of this court, commanding
him that he summon the said Railroad Labor Board and
the said R. M. Barton, G. W. W. Hanger, Ben W. Hooper,
Arthur G. Wharton, Walter L. McMenimen, Horace Baker,
J. H. Elliott, Albert Phillips and Samuel Higgins, and each
thereof, respectively, to appear before the said court on the
first day of the next term thereof, to be held at the Federal
Building, in Chicago, in the County of Cook and State of
Illinois, and that they be required to then and there answer
this bill, etc.

And May It Please Your Honors to grant unto the plaintiff
the People's Writ of Injunction as prayed for herein, to be
directed to the said Railroad Labor Board and the said R. M.
Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Whar-
ton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Al-
bert Phillips and Samuel Higgins, restraining them, and each
of them, respectively, in manner and form as prayed for in
this bill.

THE PENNSYLVANIA RAILROAD COMPANY,

By J. G. RODGERS,

Vice President.

LOESCH, SCOFIELD, LOESCH & RICHARDS,
Solicitors.

C. B. HEISERMAN,
E. H. SENEFF,
Of Counsel.

State of Illinois } ss.
County of Cook }

J. G. RODGERS, having been duly sworn, says he is Vice
President of The Pennsylvania Railroad Company and as
such is authorized to make this affidavit. That he is familiar
with the facts set out in the foregoing bill and that said facts
are true.

J. G. RODGERS.

Subscribed and sworn to before me this 9th day of December, A. D. 1921.

(Seal)

ARTHUR A. R. NELSON,
Notary Public.

(Endorsed) Filed Dec. 9, 1921 John H. R. Jamar, Clerk.

22 And afterwards on, to wit, the 9th day of December, 1921, this matter coming on to be heard, the following Temporary Restraining order was entered by the Court:

23

December 9, 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

The Pennsylvania Railroad Company

vs.

United States Railroad Labor Board,
R. M. Barton, G. W. Hanger, Ben
W. Hooper, Arthur O. Wharton,
Walter L. McMenimen, Horace
Baker, John H. Elliott, Albert
Phillips and Samuel Higgins.

In Equity
No. 2516.

This cause coming on for hearing before the Hon. Kenesaw M. Landis, District Judge, on an ex parte motion of The Pennsylvania Railroad Company, for an Order to restrain the United States Railroad Labor Board from publishing, under the provisions of Section 313 of Title III of the Railroad Transportation Act of 1920, that The Pennsylvania Railroad Company had violated Decision No. 218.

It Is Ordered by the Court that said United States Labor Board and the members of said Labor Board respectively, be and hereby are restrained from making any publication under said Section 313 of Title III of the Transportation Act of 1920, declaring that The Pennsylvania Railroad Company has violated Decision No. 218 of said Labor Board, until 10:00 A. M. December 10, 1921.

It Is Further Ordered by the Court that Plaintiff give notice to the United States Labor Board that said application for a restraining order will be heard at 10:00 o'clock A. M. on December 10, 1921.

It Is Further Ordered by the Court that the plaintiff furnish to said United States Labor Board a copy of its Bill filed herein.

Dated: December 9, 1921.

KENESAW M. LANDIS
Judge.

24 And on, to wit, the 3d day of April, 1922, came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Motion to Dismiss, in words and figures following, to wit:

25 IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA,
For the Northern District of Illinois
Eastern Division.

In the District Court Thereof, } ss.
December Term, A. D. 1912. }

The Pennsylvania Railroad Company }
vs.

United States Railroad Labor Board, }
R. M. Barton, G. Wallace, W. }
Hanger, Ben W. Hooper, Arthur }
O. Wharton, Walter L. McMen- }
men, Horace Baker, John H. Elliott, }
Albert Phillips and Samuel Higgins } In Equity
No. 2516.

Not waiving, but reserving all questions not herein raised, now come the defendants in the above entitled cause and oppose and object to the issuance of any stay order or injunction and move to dismiss the bill filed or presented in this case, and as grounds for said motion say:

First: There is no equity on the face of the bill which shows no legal or equitable grounds for relief against the defendants in this case.

Second: Said bill on its face shows no legal or equitable grounds for the exercise of the jurisdiction of this court in this case and the court is without jurisdiction herein.

Third: The bill in effect is a suit against the Government of the United States in that it seeks to enjoin and stop 26 the function of a legal and governmental agency of the United States duly and legally created by Act of Congress, and as such suit will not lie except when the governmental consent has been given which has not been done in this case.

Fourth: If plaintiff had any cause of complaint whatever by reason of the matters and things alleged in the bill, a proceeding by injunction is not the proper remedy. A court of

equity will not and cannot properly exercise its judicial powers in a case of this kind. A federal court of equity will not enjoin a federal tribunal or governmental agency of the United States from acting and exercising its function under an Act of Congress. If such agency exceeds its power there is a proper remedy at law, but not by injunction.

Fifth: No relief is sought against the individual defendants named in the bill, except to prevent them from acting and exercising certain judicial functions conferred by Act of Congress.

Sixth: The question presented by the plaintiff, stated in its simplest form is—has the Pennsylvania Railroad Company the legal or equitable right to select or participate in or determine or influence the selection of the representatives of the employees who were to negotiate a contract for the employees with the said Railroad Company?

The United States Railroad Labor Board held that the Railroad had no such right, but that the employees had 27 the right to select their own representatives for such conferences. It is of this decision that the plaintiff complains.

Seventh: The only grounds set out for complaint is the United States Railroad Labor Board had no jurisdiction. The Transportation Act of 1920 is unconstitutional. These allegations are apparently all that can be gathered from the somewhat hazy bill of complaint and did not state a cause of action against the defendants herein.

UNITED STATES RAILROAD LABOR BOARD,

R. M. BARTON

G. WALLACE

G. W. W. HANGER

BEN W. HOOPER

A. O. WHARTON

W. L. McMENIMEN

HORACE BAKER

J. H. ELLIOTT

ALBERT PHILLIPS

SAMUEL HIGGINS

By CHARLES F. CLYNE,
United States Attorney.

(Endorsed) Filed April 3, 1922 John H. R. Jamar, Clerk.

(Endorsed) Form No. 680. In Equity No. 2516 In the District Court of the United States for the Northern District

of Illinois Eastern Division. The Pennsylvania Railroad Company vs. United States Railroad Labor Board et al. Motion to Dismiss Bill. Charles F. Clyne, United States Attorney.

29 And on, to wit, the 3d day of April, 1922, came the defendants by their attorneys and filed in the Clerk's office of said Court a certain Answer, together with Exhibits 1, 2, 3, 4, 5 and 6, attached thereto, in words and figures following, to wit:

30 UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company
v.s.
United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, Arthur O. Wharton,
Walter L. McMenimen, Horace
Baker, John H. Elliott, Albert
Phillips and Samuel Higgins.

} In Equity
No. 2516.

ANSWER OF DEFENDANTS.

First Defense.

United States Railroad Labor Board and the members thereof, for the First Defense to the bill of complaint filed herein against them, say:

The suit is against the United States and the Government thereof, as the members of the United States Railroad Labor Board are appointed by the President by and with the advice and consent of the Senate and are officers of the United States, whose salaries and the expenses of the administration of whose offices are paid from appropriations out of the Treasury. The United States and the Government thereof

has not consented to be sued in the manner and form herein undertaken: Wherefore defendants move to dismiss the bill of complaint.

31 Second Defense.

United States Railroad Labor Board and the members thereof, for the Second Defense to the bill of complaint filed herein against them, say:

The suit is not a suit to annul and enjoin any order or action of the United States Railroad Labor Board or any member thereof, but it is a suit against the United States and the Government thereof, the purpose of which is to send any writ of injunction issued by the court into the hearing room of the Labor Board and the members thereof to the end that their discretion and action in the administration of their functions may be controlled so as not to be adverse to The Pennsylvania Railroad Company or contrary to what it conceives to be the rights of the parties under Title III: Wherefore defendants move to dismiss the bill of complaint.

Third Defense.

United States Railroad Labor Board and the members thereof, for the Third Defense to the bill of complaint filed herein against them, say:

Title III of the Transportation Act, 1920 (41 Stat. 456, 469), entitled "Disputes between carriers and their employees and subordinate officials," contains no provision for suits, such as the one here brought, to enjoin the United States Railroad Labor Board and the members thereof from discharging their functions or to control them in exercising their discretion under Title III, and the suit is an unauthorized attempt to control by judicial process an arm of the Legislative Department of the Government in the discharge of its functions through the United States Railroad Labor Board: Wherefore defendants move to dismiss the bill of complaint.

Fourth Defense.

United States Railroad Labor Board and the members thereof, for the Fourth Defense to the bill of complaint filed herein against them, say:

The bill of complaint is a general attack by The Pennsylvania Railroad Company on the authority of the United States Railroad Labor Board and the members

thereof and the power of Congress to enact Title III and the provisions thereof, and is not a suit raising a specific issue on a concrete statement of facts to which the judicial power through a court of equity extends; if granted, the relief sought would establish a precedent which would make the dispatch of business before the United States Railroad Labor Board and the members thereof wait on the decisions of the courts and which would not only lead to consequences of the most manifest inconvenience but would be an invasion of the Legislative by the Judicial branch of the Government: Wherefore defendants move to dismiss the bill of complaint.

Fifth Defense.

United States Railroad Labor Board and the members thereof, for the Fifth Defense to the bill of complaint filed herein against them, say:

The bill of complaint is vague, indefinite, uncertain, insufficient, without equity on its face, and does not state any cause of action against the United States Railroad Labor Board and the members thereof, and the court may not grant the relief prayed or any part of the same: Wherefore defendants move to dismiss the bill of complaint.

Sixth Defense.

United States Railroad Labor Board and the members thereof, for the Sixth Defense to the bill of complaint filed herein against them, say:

Answering the bill of complaint and each and every part thereof, it appears that without attaching copies of the decisions, or otherwise adducing them in *haec verba*, The Pennsylvania Railroad Company brings into the bill and as part thereof certain decisions of the United States Railroad Labor Board, which it, as complainant, has identified by decision numbers, docket numbers, and dates; but for the purpose of laying the foundation for its case against the United States

Railroad Labor Board and the members thereof, the
33 bill sets forth mere excerpts from those decisions and makes general allegations with respect to other matters contained therein. Inasmuch as complainant refers to mere fragments of those decisions, the facts alleged with respect thereto are wholly disconnected, incomplete and inadequate, and the defendants deny the same in manner and form as alleged and each and every part of the same. For the full and

undisputed facts with reference to the various proceedings before the United States Railroad Labor Board and the members thereof covering the subject-matter, the defendants refer to the following public documents and official publications in their entirety, being the same decisions referred to by the complainant in the bill of complaint by decision numbers, docket numbers, and dates, viz:

United States Railroad Labor Board, Chicago, Illinois, Decision No. 2 (Dockets Nos. 1, 2 and 3) July 20, 1920 (See bill of complaint, pages 9, 17);

United States Railroad Labor Board, Chicago, Illinois, Decision No. 119 (Dockets Nos. 1, 2 and 3) April 14, 1921 (See bill of complaint, pages 10, 11, 12, 13, 14, 17, 24, 25);

United States Railroad Labor Board, Chicago, Illinois, Addendum No. 2 to Decision No. 119 (Dockets Nos. 1, 2 and 3) June 27, 1921 (See bill of complaint, pages 14, 15, 17);

United States Railroad Labor Board, Chicago, Illinois, Decision No. 218 (Docket No. 404), July 26, 1921, Railway Employees Department, A. F. of L. (Federated Shop Crafts) vs. Pennsylvania System (See bill of complaint, pages 18, 19, 20, 21, 23, 25, 26, 27, 29, 30, 31);

United States Railroad Labor Board, Chicago, Illinois, Addendum No. 1 to Decision No. 218 (Docket No. 404), August 5, 1921 (See bill of complaint, page 22);

United States Railroad Labor Board, Chicago, Illinois, Order in re: Docket No. 404. September 16, 1921. Order relating to petition of the Pennsylvania System requesting the Labor Board to vacate and set aside decision No. 218, entitled "Railway Employees Department, A. F. of L. (Federated Shop Crafts) vs. Pennsylvania System (See bill of complaint, pages 23, 25, 26, 27).

34 These public documents and official publications covering the subject-matter, duly issued by the United States Railroad Labor Board in the discharge of its functions and by it published in accordance with the statute in such case made and provided, should be considered in connection with each other and together that the essential facts fully and clearly appear; and not in a fragmentary manner and separately as the complainant seeks to refer to them; nor in the light of vague and general allegations as to what they contain without producing them.

Defendants will refer to the several decisions and to each of them in their entirety upon the hearing. Copies duly certified are filed herewith marked United States Railroad La-

bor Board, Exhibits No. I, No. II, No. III, No. IV, No. V, and No. VI, respectively, and it is prayed that the same may be read and considered at the hearing as if fully set out herein and made a part hereof.

Wherefore, having fully answered, defendants pray that, the bill of complaint be dismissed at the cost of the complainant, and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE.

Special Assistant to the Attorney General.

CHARLES F. CLYNE.

United States Attorney.

EDWIN L. WEISL

Assistant United States Attorney.

35 United States of America,
Northern District of Illinois, } ss:
City of Chicago.

R. M. BARTON, being duly sworn, deposes and says that he is a member of the United States Railroad Labor Board and is Chairman thereof; that he has read the foregoing answer and knows the contents thereof, and that the same is true of his own knowledge except as to those matters therein stated on his information and belief, and as to those matters he believes them to be true; that he is duly authorized to make this affidavit and that he makes it on behalf of himself and all of the other defendants.

R. M. BARTON.

Subscribed in my presence and sworn to before me this 1st day of April, 1922.

GERTRUDE M. DILL

(Seal) *Notary Public, Cook County, Illinois.*

My commission expires Aug. 28, 1924.

(Endorsed) Filed Apr 3, 1922. John H. R. Jamar, Clerk.

UNITED STATES RAILROAD LABOR BOARD

5 North Wabash Avenue

Chicago, Illinois

April 1, 1922.

Dockets 1, 2 and 3.

I hereby certify that Decision No. 2, Dockets 1, 2 and 3, dated July 20th, 1920, International Association of Machinists et al versus the Atchison, Topeka and Santa Fe Railway et al, hereto attached, is a true copy of the Decision so entitled rendered by the United States Railroad Labor Board.

L. M. PARKER

Secretary, U. S. R. R. Labor Board.

Then personally appeared before the above named L. M. Parker and made oath to the truth of the statements by him subscribed.

GERTRUDE M. DILL

(Seal)

My Commission expires August 28, 1924.

I, R. M. Barton, Chairman, of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent, is the Secretary of the United States Railroad Labor Board.

R. M. BARTON

Chairman, U. S. R. R. Labor Board.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL

(Seal)

My Commission expires August 28, 1924.

EXHIBIT NO. 1.

UNITED STATES RAILROAD LABOR BOARD
Chicago, Illinois

Decision No. 2 (Dockets 1, 2 and 3)

A true copy L. M. Parker Secretary U. S. Labor Board.
International Association of Machinists,
Sheet Metal Workers' International Alliance,
Brotherhood of Locomotive Engineers,
Brotherhood of Railroad Trainmen,
Brotherhood of Railway & Steamship Clerks, Freight Han-
dlers, Express and Station Employees,
Switchmen's Union of North America,
Brotherhood of Stationary Firemen and Oilers,
Brotherhood of Railway Signalmen of America,
Railway Employees' Department, A. F. of L.,
United Brotherhood of Maintenance of Way Employees and
Railroad Shop Laborers,
Order of Railroad Telegraphers,
Brotherhood of Railway Carmen of America,
International Brotherhood of Electrical Workers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
International Brotherhood of Boilermakers, Iron Ship Build-
ers and Helpers of America,
International Brotherhood of Blacksmiths, Drop Forgers and
Helpers,
Masters, Mates and Pilots of America,

vs.

The Atchison, Topeka & Santa Fe Railway, *et al.*

UNITED STATES RAILROAD LABOR BOARD

R. M. Barton, Chairman.
Horace Baker.
J. E. Elliott.
Jas. J. Forrester.
G. W. W. Hanger.
Henry T. Hunt.
W. L. Park.
Albert Phillips.
A. O. Wharton.

37

UNITED STATES RAILROAD LABOR BOARD.

Chicago, Ill., July 20, 1920

Decision No. 2 (Dockets 1, 2 and 3.)

This decision is upon a controversy or dispute between the organizations of employees of carriers and the carriers named below. The subject matter of the dispute is what shall constitute just and reasonable wages and working conditions on these carriers. In March, 1920, pursuant to the Transportation Act, the dispute was considered in pursuance between representatives of the parties and not having been there decided was referred by them to this Board.

This decision is upon that portion of the dispute which covers wages and does not deal with working conditions. The organizations, parties hereto are:

International Association of Machinists
Sheet Metal Workers' International Alliance
Brotherhood of Locomotive Engineers
Brotherhood of Railroad Trainmen
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employees
Switchmen's Union of North America
Brotherhood of Stationary Firemen and Oilers
Brotherhood of Railway Signalmen of America
Railway Employees' Department, A. F. of L.

United Brotherhood of Maintenance of Way Employees and Railroad Shop Laborers

Order of Railroad Telegraphers

Brotherhood of Railway Carmen of America

International Brotherhood of Electrical Workers

Brotherhood of Locomotive Firemen and Enginemen

Order of Railway Conductors

International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America

International Brotherhood of Blacksmiths, Drop Forgers and Helpers

Masters, Mates and Pilots of America

The carriers parties to the dispute are named in Article I of this decision.

A number of carriers, including many so called "short lines" are not parties. Hence they are not directly affected by this decision. Any dispute between them and their employees, when properly brought before this Board, will be heard at an early date.

A statement of the origin and nature of the controversy follows.

On December 28, 1917, the President, as a war measure, under the Possession and Control Act of August 29, 1916, took over and operated through the Director General of Railroads approximately ninety-three per cent of the railroad mileage of the country. The Transportation Act of Feb. 28, 1920, terminated Federal control and on March 1st these railroads reverted to their owners.

From August, 1914 to December, 1917 the wages of railroad employees remained substantially unaltered. By December, 1917 the social and industrial changes which accompanied the World War had thrown such wages seriously out of line with those in other industries and with the cost of living. A short time prior to Federal control, organizations of railroad employees presented to the managements requests for substantial increases. The Director General on January 10, 1918 appointed the "Lane Commission," referred these requests to it and empowered it to investigate the compensation of railroad employees and to make such recommendations as should be deemed proper. On the basis of the Commission's report, the Director General's Order No. 27 was promulgated on May 25, 1918. It increased the pay of railway employees then receiving less than \$250.00 per month by percentages graduated from 43 per cent to the lower paid

employees to zero per cent to those receiving salaries of \$249.00 per month. The principle back of this order was thus stated in the Lane report: "In fairness a sufficient increase should be given to maintain that standard of living which obtained in the pre-war period . . . and upon those who can best afford to sacrifice should be cast the greater burden."

General Order No. 27 was based upon the cost of living at the time it was formulated. These costs, however, continued to rise through the years 1918 and 1919. In January, 1919 the shop crafts and thereafter other railroad employees presented requests for further wage increases aggregating some \$800,000,000 per annum. The Director General transmitted these requests to the President, who, on August 25, 1919, urged the employees to refrain from pressing them, pending a better opportunity to estimate the permanence of high living costs.

In February, 1920 these costs having continued to rise and a reasonable time for the appearance of a trend toward lower living costs having elapsed, the organizations of railroad employees renewed their requests for wage increases to the Director General, who declined to act, and was supported by the President in so doing, in view of the approaching termination of Federal control. The President, however, on February 13th, agreed to use his influence toward the establishment by Congress of legal machinery to deal with controversies between the carriers and their employees. On February 28, 1920, the Transportation Act became law. This Act provides for the appointment by the President of a Railroad Labor Board which shall decide disputes with reference to wages and working conditions of railroad em-

ployees. Section 301 of the Act provides that all such disputes shall be considered and, if possible, decided in conference between representatives of the carrier concerned and representatives of its employees. At the suggestion of the President, the requests for increases in wages and for changes in working conditions submitted to the Director General in February were the subject of conference between representatives of the carriers and of the organizations concerned. This conference extended from March 10 to April 1, 1920, but resulted in complete failure to agree.

This long delay and succession of disappointments, coupled with the pressure of a further rise in living costs produced deep and not unreasonable dissatisfaction on the part of rail-

road employees who felt themselves called on to make sacrifices, as they believed, far beyond those of any other class. Nevertheless, the great majority have continued to serve and to conduct the transportation of the country, awaiting with disciplined and patriotic patience, the reduction of living costs, the decision of the Director General on their requests, the action of Congress, the conclusions of the conference, the appointment of this Board, the presentation of evidence to it and this decision. Eighteen months will have elapsed when this decision is rendered from the original presentation in January, 1919 of the first of the requests which it in part determines. For these reasons and as a measure of justice it was decided and announced by this Board on June 12th that this decision, when made, would be effective as of May 1st, 1920, and would apply according to the time served to all employees who were in the service as of May 1st and who have remained therein or who have come into the service since and remained therein.

The Board, on the day after its members were confirmed by the Senate (April 15, 1920), received the controversy which had been so long pending and which had remained so long unsettled in spite of the efforts and conferences noted above. From that day until the date of this decision it has been constantly and assiduously engaged in receiving evidence, hearing arguments, reading and considering the many volumes of testimony offered and the many thousands of pages of exhibits and statements. Approximately two million men, comprehended in more than one thousand classifications, are affected by this decision. It is believed that few more serious, difficult and intricate problems have been presented to tribunals of this country.

In arriving at its decision, the Board has taken into consideration, as the Transportation Act prescribes:

“(1) The scale of wages paid for similar kinds of work in other industries;

“(2) The relation between wages and the cost of living;

“(3) The hazards of the employment;

“(4) The training and skill required;

“(5) The degree of responsibility;

“(6) The character and regularity of the employment, and

“(7) Inequalities of increase in wages or of treatment, the result of previous wage orders or adjustments.”

Besides the circumstances set out above the Act provides the Board shall consider in determining wages “other rele-

vant circumstances." This, it understands, comprehends, among other things, the effect the action of this Board may have on other wages and industries, on production generally, the relation of railroad wages to the aggregate of transportation costs and requirements for betterments, together with the burden on the entire people of railroad transportation charges.

The Board has been unable to find any formula which applied to the facts would work out a just and reasonable wage for the many thousands of positions involved in this dispute. The determination of such wages is necessarily a matter of estimate and judgment in view of the conditions; a matter on which individuals will differ widely as their information or lack of it, their interest, situation and bias may influence them.

Those persons who consider the rates determined on herein too high should reflect on the abnormal conditions resulting from the high cost of living and the high rates now being paid in other industry. The employees who may believe these rates too low should consider the increased burden these rates will place on their fellow countrymen, many of whom are less favorably situated than themselves.

The Board has considered the seven circumstances suggested by the Act. "The hazards of the employment," "the training and skill required" and "the degree of responsibility" were well presented by the representatives of the employees and of the carriers. These factors are recognized by all and have had due weight. With reference to "the character and regularity of the employment," the Board finds that with few exceptions railroad employment is more regular, and the character of the work is more desirable than like occupations outside. As a rule railroad employees are such for life and usually remain for years with the same company. This permanence of employment has certain advantages which have been considered by the Board. As to "inequalities of increases in wages or of treatment the result of previous wages orders or adjustments" the urgency of prompt action has made elaborate investigation into this factor impracticable. It has, however, been considered. With regard to "the scale of wages paid for similar kinds of work in other industries," and "the relation between wages and the cost of living," the Board has been under some difficulty. It is clear that the cost of living in the United States has increased approximately one hundred per cent since 1914. In

many instances the increases to employees herein fixed, together with prior increases granted since 1914, exceed 39 this figure. The cost of living and wages paid for similar kinds of work in other industries, however, differ as between different parts of the country. Yet standardization of pay for railroad employees has proceeded so far and possesses such advantages that it was deemed inexpedient and impracticable to establish new variations based on these varying conditions.

For the reasons stated it was necessary to adopt the method of determining what, if any, increases over existing wages (established under the authority of the United States Railroad Administration) would constitute a reasonable and just wage for the hundreds of classifications of railroad employees. By so doing such differences in present rates as are the result of local differences are preserved together with (in general) the differentials between different classes of employees which have come about in the railroad service and which may be considered *prima facie* to be based on good reason. It is believed that this method accomplishes that approximation to justice which is practicable in human affairs.

The Board has endeavored to fix such wages as will provide a decent living and secure for the children of the wage earners opportunity for education, and yet to remember that no class of Americans should receive preferred treatment and that the great mass of the people must ultimately pay a great part of the increased cost of operation entailed by the increase in wages determined herein.

It has been found by this Board generally that the scale of wages paid railroad employees is substantially below that paid for similar work in outside industry, that the increase in living cost since the effective date of General Order No. 27 and its supplements has thrown wages below the pre-war standard of living of these employees and that justice as well as the maintenance of an essential industry in an efficient condition require a substantial increase to practically all classes.

The American people desire and must have transportation adequate to their needs. They also wish to do justice to men employed in the public service whether on public utilities or otherwise. Wage scales which are insufficient to attract or support men of the character necessary for railroad work constitute waste and extravagance and not economy. Transportation cannot be efficient unless the personnel throws itself into its work with the devotion which public service ought to

inspire and no such devotion can exist in the minds of men who feel themselves treated with injustice. It is hoped that the present decision which adds substantial amounts to present wages will be felt to be just and equitable under all the circumstances and railroad employees will accordingly render the best service of which they are capable. If they will do this, it is believed the American people will receive benefits far outweighing the cost of the increases decided upon herein.

It is believed that if the keen intelligence of railroad employees and managers alike is fired by an eagerness to serve the people and a spirit of co-operation to that end is brought about, such economies of material and labor, such improvements in method and workmanship, such solutions of transportation problems will result as will offset a great part of the increase of wages provided for herein and that the people will thus be relieved of a part of the burden of these increases. They deserve and have a right to expect this spirit.

During the hearings, the "International Association of Railroad Supervisors of Mechanics," and "The American Train Dispatchers' Association" have been made parties to this dispute. In granting hearings to them, this Board has not assumed or decided any question of jurisdiction between the several organizations or associations either parties to or outside of this dispute.

These are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with the materially affect earnings and wages. Adequate investigation and consideration of these questions would demand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason, it has been necessary,—and both parties to the controversy have indicated it to be their judgment and wish, that the Board should separate the questions involving rules and working conditions from the wage questions. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise and this decision will be so understood and applied.

The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration and determination of the questions per-

taining to the continuation or modification of such rules, conditions and agreements no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions and agreements, further hearings will be had at the earliest practicable date and decision thereon will be rendered as soon as adequate consideration can be given.

It is further declared that this Board, finding it necessary to adopt a basis for the rates and advances decided on, has adopted the rates established by or under the authority of the

United States Railroad Administration. The intent of 40 this decision is that the named increase except as otherwise stated shall be added to the rate of compensation established by and under the authority of the United States Railroad Administration.

The decision of the Board is the result of the action of the Board, composed of nine members acting as a body, under the usual parliamentary methods of procedure and its own rules. Each and every separate question was considered and voted upon—each and every rate for each class was voted upon and adopted by a majority vote of the Board, and in every instance one or more of the public group, as the law requires, voted in the affirmative on any classification or rate adopted.

In a problem so complex and involving the inter-relationship of the wages of so many different classes of employees, it is obvious that there could not be unanimous agreement among all the members of the Board on all increases fixed by this decision; but inasmuch as the several increases herein-after set forth represent, in each instance, the best judgment of the majority of the Board it is believed that no useful purpose would be served by setting forth the views held by the members who for one or another reason dissented from particular increases. This statement is made in order that it may not be inferred that the decision, in all its details, states the precise increase which any one of the members hereof might have stated if he had the sole power and responsibility for fixing such increase.

This Board estimates that the increase in wages herein provided for will impose on the railroads an addition to the payroll of March 1st, 1920 aggregating approximately six hundred millions of dollars per annum.

The Board appreciates that some time will necessarily be required for computing back pay from May 1st. This is work

of a kind which must be done by regular employees, familiar with the classifications, rates and rules.

The Board believes that the railroads will proceed with diligence in the matter. It urges upon them that there be no unnecessary delay; and it urges equally upon the employees that they exercise patience and refrain from unreasonable pressure or criticism.

The Board decides upon the present dispute and submission that the rates of increase set out below, added and applied to the rates established for the positions specified by or under the authority of the United States Railroad Administration, constitute, for the said positions on carriers named herein, a just and reasonable wage.

The Board also decides that the rates set out below constitute for the positions specified on carriers named herein a just and reasonable wage.

ARTICLE I.—RAILROADS AFFECTED.

Abilene & Southern.

Alabama & Vicksburg Ry.

American Refrigerator Transit Co.

American Railway Express Co.

(As to employees coming under the provisions of the Agreement between the United States Railroad Administration and the Federated Shop Crafts, dated September 30, 1919.)

Ann Arbor R. R.

Manistique & Lake Superior R. R.

Atchison, Topeka & Santa Fe Ry.

Beaumont Wharf & Terminal Co.

Kansas South Western Ry.

Grand Canyon Railway.

Gulf Colorado & Santa Fe Ry.

Rio Grande, El Paso & Santa Fe R. R.

Panhandle & Santa Fe Ry.

Atlanta & West Point R. R.

Western R. R. of Alabama.

Atlanta, Birmingham & Atlantic Ry.

Atlanta Joint Terminals.

Atlantic Coast Lines.

Washington & Vandemere R. R.

Baltimore & Ohio R. R.

Baltimore & Ohio Chicago Terminal R. R.

Coal & Coke R. R.

Dayton & Union R. R.
Sandy Valley & Elkhorn.
Sharpsville R. R.
Staten Island Rapid Transit Ry.
Bessemer & Lake Erie R. R.
Boston Terminal R. R.
Boston & Maine R. R.
Barre & Chelsea R. R.
Montpelier & Wells River R. R.
St. Johnsbury & Lake Champlain R. R.
Sullivan County R. R.
Vermont Valley R. R.
York Harbor & Beach R. R.
Buffalo Creek R. R.
Buffalo & Susquehanna R. R. Corporation.
Buffalo, Rochester & Pittsburgh Ry.
Camas Prairie R. R.
Canadian Pacific Railway Co.
Carolina, Clinchfield & Ohio Ry.
Carolina, Clinchfield & Ohio Ry. of S. C.
Central New England Ry.
Central of Georgia Ry.
Wadley Southern Ry.
Sylvania Central Ry.
Central R. R. of New Jersey.
Central Vermont Ry.
Central Vermont Trans. Co.
Charleston & Western Carolina Ry. Co.
Chesapeake & Ohio Lines.
Chesapeake & Ohio R. R. of Indiana.
Chicago & Alton R. R.
Chicago & Eastern Illinois R. R.
Chicago & Northwestern Ry.
Pierre & Fort Pierre Bridge Co.
Pierre, Rapid City & Northwestern Ry.
Wyoming & Northwestern Ry.
Missouri Valley & Blair Ry. & Bridge Co.
Chicago, Burlington & Quincy R. R.
Quincy, Omaha & Kansas City R. R.
Chicago Great Western R. R.
Chicago, Indianapolis & Louisville Ry.
Chicago, Milwaukee & St. Paul Ry.
Bellingham & Northern Ry.
Gallatin Valley R. R.

Milwaukee Terminal.
Puget Sound & Willapa Harbor Ry.
Tacoma Eastern R. R.
Seattle, Port Angeles & Western R. R.
Chicago, Peoria & St. Louis R. R.
Chicago, Rock Island & Pacific Ry.
Chicago, Rock Island & Gulf Ry.
Chicago, St. Paul, Minneapolis & Omaha Ry.
Chicago, Terre Haute & Southeastern Ry.
Cincinnati, Indianapolis & Western Ry.
Colorado & Southern Ry.
Wichita Valley Ry.
Colorado & Wyoming R. R.
Davenport, Rock Island & Northwestern R. R.
Delaware & Hudson Co.
Delaware, Lackawanna & Western R. R.
Lackawanna & Montrose R. R.
Sussex R. R.
Denver & Rio Grande R. R.
Rio Grande Southern R. R.
Denver & Salt Lake R. R.
Detroit, Toledo & Ironton R. R.
Duluth, South Shore & Atlantic Ry.
Mineral Range R. R.
Elgin, Joliet & Eastern R. R.
El Paso & Southwestern Co.
Morenci Southern Ry.
41 Erie R. R.
Bath & Hammondsport R. R.
Chicago & Erie R. R.
New Jersey & New York R. R.
New York, Susquehanna & Western R. R.
Wilkes-Barre & Eastern R. R.
Florida East Coast Ry.
Fort Worth Belt Ry.
Fort Worth & Denver City Ry.
Georgia Railroad Co.
Georgia, Florida & Alabama Ry.
Grand Trunk System—Lines in U. S.
Atlanta & St. Lawrence R. R.
Champlain & St. Lawrence R. R.
Chicago, Detroit & Canadian Grand Trunk Junction R. R.
Cincinnati, Saginaw & Mackinaw R. R.
Detroit, Grand Haven & Milwaukee Ry.

Grand Trunk Western Ry.

Lewiston & Auburn R. R.

Michigan Air Line Ry.

Pontiac, Oxford & Northern R. R.

St. Clair Tunnel.

Toledo, Saginaw & Muskegon Ry.

United States & Canada R. R.

Great Northern Ry.

Duluth Terminal.

Duluth & Superior Bridge Co.

Minneapolis Western Ry.

Watertown & Sioux Falls R. R.

Farmers Grain & Shipping Co.

Gulf & Ship Island R. R.

Gulf Coast Lines.

New Orleans, Texas & Mexico R. R.

St. Louis, Brownsville & Mexico R. R.

Beaumont, Sour Lake & Western R. R.

Orange & Northwestern R. R.

Gulf, Mobile & Northern R. R.

Hocking Valley Ry.

Huntington & Broad Top Mountain R. R. & Coal Co.

Illinois Central R. R.

Chicago, Memphis & Gulf R. R.

Dunleith & Dubuque Bridge.

Yazzo & Mississippi Valley R. R.

Illinois Terminal R. R.

International & Great Northern Ry.

Jacksonville Terminal R. R.

Kansas City, Clinton & Springfield R. R.

Kansas City, Mexico & Orient R. R.

Kansas City, Mexico & Orient R. R. of Texas.

Kansas City Southern Ry.

Kansas, Oklahoma & Gulf Railway Co.

Lehigh & New England R. R. Co.

Lehigh Valley R. R.

Los Angeles & Salt Lake R. R.

Louisiana & Arkansas Ry.

Louisville & Nashville R. R.

Louisville, Henderson & St. Louis R. R.

Maine Central R. R.

Midland Valley R. R.

Minneapolis & St. Louis R. R.

Minneapolis, St. Paul & Sault Ste. Marie Ry.

Missouri, Kansas & Texas Ry.
Missouri, Kansas & Texas Ry. of Texas.
Wichita Falls & Northwestern Ry.
Missouri & North Arkansas R. R. Co.
Missouri Pacific R. R.
Nashville, Chattanooga & St. Louis Ry.
Nevada Northern Ry.
New Orleans, Great Northern R. R.
New York Central Lines.
Boston & Albany R. R.
Chicago, Kalamazoo & Saginaw Ry.
Cincinnati Northern R. R.
Cleveland, Cincinnati, Chicago & St. Louis Ry.
Evansville & Indianapolis R. R.
Muncie Belt Ry.
Indiana Harbor Belt R. R.
Kanawha & Michigan Ry.
Kanawha & West Virginia R. R.
Kankakee & Seneca.
Lake Erie & Western R. R.
Michigan Central R. R.
New York Central R. R.
Pittsburgh & Lake Erie R. R.
Rutland R. R.
Toledo & Ohio Central R. R.
Zanesville & Western R. R.
New York, Chicago & St. Louis R. R.
New York, New Haven & Hartford R. R.
New York, Ontario & Western Ry.
Norfolk & Portsmouth Belt Line R. R. Co.
Norfolk & Western Ry.
Virginia-Carolina R. R.
New River, Holston & Western.
Williamson & Pond Creek R. R.
Tug River & Kentucky R. R.
Norfolk Southern R. R.
Northern Pacific Ry.
Gilmore & Pittsburgh R. R.
Big Fork & International Falls Ry.
Minnesota & International Ry.
Northern Pacific Terminal Co. of Oregon.
Northwestern Pacific R. R.
Oregon Union R. R. & Depot Co.

Pennsylvania Lines:

Baltimore & Sparrows Point R. R.

Baltimore, Chesapeake & Atlantic Ry.

Barnegat R. R.

Cape Charles R. R.

Cincinnati, Lebanon & Northern Ry.

Cornwall & Lebanon R. R.

Connecting Terminal R. R.

Cumberland Valley R. R.

Grand Rapids & Indiana Ry.

Long Island R. R.

Lorain, Ashland & Southern R. R.

Louisville Bridge & Terminal Ry. Co.

Manufacturers Ry.

Maryland, Delaware & Virginia Ry.

New York, Philadelphia & Norfolk R. R.

Ohio River & Western Ry.

Pennsylvania Co.

Pennsylvania R. R.

Pennsylvania Terminal Ry.

Philadelphia & Beach Haven R. R.

Pittsburgh, Cincinnati, Chicago & St. Louis Ry.

Rosslyn Connecting R. R.

Union R. R. Co. of Baltimore.

Waynesburg & Washington R. R.

West Jersey & Seashore R. R.

Wheeling Terminal Ry.

Pere Marquette R. R.

Philadelphia & Reading Ry.

Atlantic City R. R.

Catasauqua & Fogelsville R. R.

Chester & Delaware River R. R.

Gettysburg & Harrisburg Ry.

Middletown & Hummelstown R. R.

Northeast Pennsylvania R. R.

Perkiomen R. R.

Philadelphia & Chester Valley R. R.

Philadelphia, Newton & New York R. R.

Pickering Valley R. R.

Port Reading R. R.

Reading & Columbia R. R.

Rupert & Bloomsburg R. R.

Stony Creek R. R.

Tamaqua, Hazleton & Northern R. R.

Williams Valley R. R.
Pittsburgh & Shawmut R. R.
Pittsburgh & West Virginia Ry.
Richmond, Fredericksburg & Potomac R. R.
St. Joseph Belt Ry.
St. Louis & O'Fallon Ry.
St. Louis Refrigerator Car Co.
St. Joseph & Grand Island Railway Co.
St. Louis-San Francisco Ry.
 Brownwood North & South Ry.
 Fort Worth & Rio Grande Ry.
 Paris & Great Northern Ry.
 St. Louis, San Francisco & Texas Ry.
St. Louis Southwestern Ry.
 Eastern Texas R. R.
 Pine Bluff & Arkansas River Ry.
 St. Louis Southwestern Ry. of Texas.
San Antonio, Uvalde & Gulf Ry. Co.
San Antonio & Arkansas Pass Ry. Co.
San Diego & Arizona Ry. Co.
Seaboard Air Line Ry.
 Chesterfield & Lancaster R. R.
South Buffalo R. R.
Southern Railway Co.
 Cincinnati, New Orleans & Texas Pacific R. R. Co.
 Alabama & Great Southern Railroad Co.
 New Orleans and Northeastern.
 Harriman & Northeastern R. R. Co.
 Cincinnati, Burnside & Cumberland River.
 Northern Alabama Railroad Co.
 Georgia, Southern & Florida R. R. Co.
 Mobile & Ohio Railway Co.
Southern Pacific Co.
 Arizona & Eastern R. R.
 Galveston, Harrisburg & San Antonio Ry.
 Houston & Shreveport R. R.
 Houston & Texas Central R. R.
 Houston, East & West Texas Ry.
 Iberia & Vermillion R. R.
 Lake Charles & Northern R. R.
 Louisiana Western R. R.
 Morgan's Louisiana & Texas R. R. & S. S. Co.
 Texas & New Orleans R. R.

Spokane, Portland & Seattle R. R.

Oregon Electric Ry.

Oregon Trunk Ry.

Tennessee Central R. R.

Texarkana & Ft. Smith R. R.

Texas Midland R. R.

42 Texas & Pacific Ry.

Dennison & Pacific Suburban Ry.

Weatherford, Mineral Wells & Northwestern Ry.

Toledo, Peoria & Western R. R.

Toledo, St. Louis & Western R. R.

Trans-Mississippi Terminal Co.

Trinity & Brazos Valley R. R.

Ulster & Delaware R. R. Co.

Union Pacific R. R.

Oregon Short Line R. R.

Oregon-Washington R. R. & Nav. Co.

Union Stock Yards of Omaha.

Vicksburg, Shreveport & Pacific Ry.

Virginia Ry.

Wabash Ry.

Washington Southern Ry.

West Side Belt Ry. Co.

Western Maryland Ry.

Western Pacific R. R.

Western Ry. of Alabama.

Wheeling & Lake Erie Ry.

Winston-Salem Southbound Ry. Co.

Cumberland & Pennsylvania R. R. Co.

Monongahela Railroad.

All Union Depot and Terminal Companies, a majority of whose stock is owned by railroads enumerated above.

ARTICLE II.—CLERICAL AND STATION FORCES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

Sec. 1. Storekeepers, assistant storekeepers, chief clerks, foremen, subforemen, and other clerical supervisory forces 13 cents.

Sec. 2. Clerks with an experience of one (1) or more years in railroad clerical work, or clerical work of a similar nature in other industries, or where their cumulative experience in

such clerical work is not less than one (1) year.....13 cents.

Sec. 3. Clerks whose experience as above defined is less than one (1) year, and until an experience of one (1) year in such work entitles them to the increase provided for in Section 26½ cents.

Sec. 4. Train and engine crew callers, assistant station masters, train announcers, gatemen, and baggage and parcel room employees (other than clerks).....13 cents.

Sec. 5. Janitors, elevator and telephone switchboard operators, office, station and warehouse watchmen, and employees engaged in assorting way bills and tickets, operating appliances or machines for perforating, addressing envelopes, numbering claims and other papers, gathering and distributing mail, adjusting dictaphone cylinders, and other work10 cents.

Sec. 6. Office boys, messengers, chore boys and other employees under eighteen years of age, filling similar positions, and station attendants5 cents.

Sec. 7. Station, platform, warehouse, transfer, dock, pier, store-room, stock-room, and team-track freight handlers or truckers, and others similarly employed.....12 cents.

Sec. 8. The following differentials shall be created or maintained, as the case may be, between truckers and the classes named below:

- (a) Sealers, scalers, and fruit and perishable inspectors, one (1) cent per hour above truckers' rates as established under Section 7.
- (b) Stowers or stevedores, callers or loaders, locators and coopers, two (2) cents per hour above truckers' rates as established under Section 7.

The above shall not operate to decrease any existing higher differentials.

Sec. 9. All common laborers in and around stations, store-houses and warehouses, not otherwise provided for..8½ cents.

ARTICLE III.—MAINTENANCE OF WAY AND STRUCTURES AND UNSKILLED FORCES SPECIFIED.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

Sec. 1. Building, bridge, painter, construction, mason and concrete, water supply, and plumber foremen, except such water supply, and plumber foremen as were paid under the

provisions of Supplement No. 4 to General Order No. 27

Sec. 2. Assistant building, bridge, painter, construction, mason and concrete, water supply, and plumber foremen, and for coal wharf, coal chute, and fence gang foremen, pile driver, ditching and hoisting engineers and bridge inspectors except such assistant water supply and plumber foremen as were paid under the provisions of Supplement No. 4 to General Order No. 27 15 cents.

Sec. 3. Section, track and maintenance foremen, and assistant section, track and maintenance foremen 15 cents.

Sec. 4. Mechanics in the maintenance of way and bridge and building departments, except those that come under the provisions of the natural agreement with the Federated Shop Trades 15 cents.

Sec. 5. Mechanics' helpers in the maintenance of way and bridge and building departments, except those that come under the provisions of the national agreement with the Federated Shop Trades 8½ cents.

Sec. 6. Track laborers, and all common laborers in the maintenance of way department and in and around shops and roundhouses, not otherwise provided for herein 8½ cents.

Sec. 7. Drawbridge tenders and assistants, pile-driver, ditching and hoisting firemen, pumper engineers and pumpers, crossing watchmen or flagmen, and lamp lighters and tenders 8½ cents.

Sec. 8. Laborers employed in and around shops and roundhouses, such as engine watchmen and wipers, fire builders, ash-pit men, flue borers, coal passers (except those coming under the provisions of Article VII, Section 3, this decision), coal chute men, etc. 10 cents.

ARTICLE IV.—SHOP EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

Sec. 1. Supervisory forces 13 cents.

Sec. 2. Machinists, boilermakers, blacksmiths, sheet metal workers, electrical workers, carmen, moulders, cupola tenders and coremakers, including those with less than four years experience, all crafts 13 cents.

Sec. 3. Regular and helper apprentices and helpers, all classes 13 cents.

Sec. 4. Car cleaners 5 cents.

ARTICLE V.—TELEGRAPHERS, TELEPHONERS AND AGENTS.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

43 Sec. 1. Telegraphers, telephone operators (except switchboard operators), agents (except agents at small non-telegraph stations as referred to in Supplement No. 13 to General Order No. 27, Article IV, Section c), agent telegraphers, agent telephoners, towermen, lever men, tower and train directors, block operators and staffmen.....10 cents.

Sec. 2. Agents at small non-telegraph stations as referred to in Supplement No. 13 to General Order No. 27, Article IV, Section (c).....5 cents.

ARTICLE VI.—ENGINE SERVICE EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per mile, per hour, or per day, as the case may be, except in Section 4, as noted:

Sec. 1.—Passenger Service.

Class.	Per mile.	Per day.
	Cents.	
Engineers and motormen.....	.8	\$0.80
Firemen (coal or oil).....	.8	.80
Helpers (electric) .....	.8	.80

Sec. 2.—Freight Service.

Class.	Per mile.	Per day.
	Cents.	
Engineers (steam, electric, or other power)	1.04	\$1.04
Firemen (coal or oil).....	1.04	1.04
Helpers (electric)	1.04	1.04

Sec. 3.—Yard Service.

Class.	Per hour.
	Cents.
Engineers	18
Firemen (coal or oil)	18
Helpers (electric)	18

Sec. 4.—Hostler Service.

Note: Superseding rates established by or under the authority of the United States Railroad Administration, and in lieu thereof, for each of the hereinafter named classes, the following increased rates are established:

Class.	Per day.
Outside hostlers	\$6.24
Inside hostlers	5.60
Helpers	5.04

ARTICLE VII.—TRAIN SERVICE EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per mile, per day, or per month, as the case may be, except in Section 4, as noted:

Sec. 1—Passenger Service.

Class.	Per Mile. Cents.	Per Day.	Per Month.
Conductors . . . . .	.67	\$1.00	\$30.00
Assistant conductors or ticket collectors . . . . .	.67	1.00	30.00
Baggagement handling both express and dynamo . . . . .	.67	1.00	30.00
Baggagement operating dynamo . . . . .	.67	1.00	30.00
Baggagemen handling express . . . . .	.67	1.00	30.00
Baggagemen . . . . .	.67	1.00	30.00
Flagmen and brakemen . . . . .	.67	1.00	30.00

Sec. 2—Suburban Service (Exclusive).

Class.	Per Mile. Cents.	Per Day.	Per Month.
Conductors .....	.67	\$1.00	\$30.00
Ticket collectors .....	.67	1.00	30.00
Guards performing duties of brakemen or flagmen.....	.67	1.00	30.00

Sec. 3.—Freight Service.

Class.	Per Mile. Cents.	Per Day.
Conductors (through)	1.04	\$1.04
Flagmen and brakemen (through).....	1.04	1.04
Conductors (local or way freight).....	1.04	1.04
Flagmen and brakemen (local or way freight)	1.04	1.04

Sec. 4.—Yard Service.

Note: Superseding rates established by or under the authority of the United States Railroad Administration, and in lieu thereof, for each of the hereinafter named classes, the following increased rates are established:

Class.	Per Day.
Foremen	\$6.96
Helpers	6.48
Switchtenders	5.04

44 ARTICLE VIII.—STATIONARY ENGINE (STEAM) AND BOILER ROOM EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

- Sec. 1. Stationary engineers (steam).....13 cents.
- Sec. 2. Stationary firemen and engine room oilers.13 cents.
- Sec. 3. Boiler room water tenders and coal passers.10 cents.

ARTICLE IX.—SIGNAL DEPARTMENT EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

Sec. 1. Signal foremen, assistant signal foremen and signal inspectors.....	13 cents.
Sec. 2. Leading maintainers, gang foremen and leading signalmen	13 cents.
Sec. 3. Signalmen, assistant signalmen, signal maintainers and assistant signal maintainers.....	13 cents.
Sec. 4. Helpers	10 cents.

ARTICLE X.—MASTERS, MATES AND PILOTS.

Superseding rates established by or under the authority of the United States Railroad Administration, and in lieu thereof, for each of the hereinafter named classes, the following increased rates are established; provided, that these increases shall be applied only to railroad operated car floats, lighters and ferries and railroad operated tug boats propelling railroad operated car floats, lighters and ferries.

Sec. 1.—New York Harbor.

	Per Month
Ferryboats.	
Masters, pilots or captains.....	\$220.00
Mates or first officers.....	150.00
Tugboats and Steam Lighters.	
Masters, pilots or captains.....	\$220.00
Pilots (South Amboy, Perth Amboy and Port Reading coal towing lines)	200.00
Mates	150.00

Sec. 2.—Philadelphia, Camden and Wilmington District

Ferryboats.

Masters or pilots (regular).....	(a) \$190.30
Extra pilots (promoted).....	(a) 150.22

Tugboats.

Masters or captains.....	(a) \$150.96
Mates	(a) 110.00

(a) Based on 8 hours per day.

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Sec. 3.—New Orleans, Anchorage, Baton Rouge, Vicksburg, Delta Point, Avondale, Algiers, Harahan and Gouldsboro District.

Southern Pacific "Carrier."		
One master-pilot		\$230.00
Two master-pilots		220.00
Southern Pacific "Mastodon."		
One master		\$230.00
Two masters		220.00
Southern Pacific "El Vivo" and "El Listo."		
Pilots		\$155.00
Southern Pacific "Restless."		
Masters		\$180.00
Louisiana-Mississippi "Albatross" and "Pelican."		
Captains		\$230.00
Pilots		220.00
Gulf Coast Lines "B. F. Yoakum."		
One master		\$230.00
Two masters		220.00
Texas and Pacific "L. S. Thorne" and "Gouldsboro."		
Master		\$230.00
Pilots		220.00
Mates		140.00

Sec. 4.—Newport News, Hampton Roads and Norfolk District.

New York, Philadelphia and Norfolk Railroad Bay Freight Service, Tugs "Cape Charles," "Parksley," "Delmar," "Pocomoke," "Salisbury," "Crisfield," "Portsmouth" and "Norfolk."		
Captains		\$250.00
New York, Philadelphia and Norfolk Railroad Barges, 2, 4, 5, 8, 9, 10, 14, 16, 17 18.		
Captains		\$210.00
New York Philadelphia & Norfolk Railroad Tug "Philadelphia."		
Captains		\$191.75
Chesapeake & Ohio Railroad Tugs "Greer," "Alice," "Hinton," "Wanderer," and "Helen."		
Mates		\$160.00
Norfolk Southern Railroad Tug.		
Master (day)		\$160.00
Captain (night)		150.00

Chesapeake & Ohio Railroad, Steamer "Virginia."	
Master and pilot.....	\$215.00
First mate	160.00
Second mate	160.00
Southern Railroad Ferry Steamer and Tug.	
Captain (day)	\$190.00
Captain (night)	180.00
Mate	160.00
Mate	145.00
Atlantic Coast Line Railroad Tugs "Norfolk" and "Pinners Point."	
Captain (day)	\$190.00
Captain (night)	180.00
45 Atlantic Coast Lines Railroad Passenger Barge.	
Masters	\$122.32

Sec. 5.—Port of Baltimore.

Baltimore and Ohio Railroad Tug "Liverpool."	
Masters	\$201.00
Mates	147.00

ARTICLE XI.—OTHER SUPERVISORY FORCES.

Add to the rates established by or under the authority of the United States Railroad Administration, for each of the hereinafter named classes, the following amounts per hour:

Sec. 1. Train dispatchers..... 13 cents.
Sec. 2. Yard masters and assistant yard masters.. 15 cents.

ARTICLE XII.—MISCELLANEOUS EMPLOYEES.

Add to the rates established by or under the authority of the United States Railroad Administration, for employees in the hereinbefore named departments who are properly before the Board and not otherwise provided for, an amount (as per Section 3, Article XIII) equal to that established for the respective classes to which the miscellaneous classes herein referred to are analogous. The intent of this article is to extend this decision to a miscellaneous class of supervisors and employees, practically impossible of specific classification, and at the same time insure to them the same consideration and rate increase as provided for analogous service.

ARTICLE XIII.—GENERAL APPLICATION.

Sec. 1. The increases in wages and the rates hereby established shall be effective as of May 1, 1920, and are to be paid according to the time served to all who were then in the carriers' service and remained therein, or who have since come into such service and remained therein.

Sec. 2. The provisions of this decision will not apply in cases where amounts less than thirty dollars (\$30.00) per month are paid to individuals for special service which takes only a portion of their time from outside employment or business.

Sec. 3. Increases specified in this decision are to be added to the hourly rates as established by or under the authority of the United States Railroad Administration for employees now being paid by the hour. For employees paid by the day, add eight times the hourly increase specified to the daily rate. For employees paid by the month, add two hundred and four (204) times the hourly rate specified to the monthly rate.

Sec. 4. Each carrier will in payment to employees on and after August 1, 1920, include therein the increases in wages and the rates hereby established.

Sec. 5. The amounts due in back pay from May 1, 1920, to July 31, 1920, inclusive, in accordance with the provisions of this decision, will be computed and payment made to the employees separately from the regular monthly or semi-monthly payments, so that employees will know the exact amount of their back payments.

Recognizing the clerical work necessary to make these computations for back pay and the probable delay before the entire period can be covered, each month, beginning with May, 1920, shall be computed as soon as practicable and, as soon as completed, payment shall be made.

Sec. 6. The increases in wages and the rates hereby established shall be incorporated in and become a part of existing agreements or schedules.

Sec. 7. Except as specifically modified herein, the rules regulating payments of overtime or working conditions in all branches of service, and the established and accepted methods of computing time and compensation thereunder, shall remain in effect until or unless changed in the manner provided by the Transportation Act, 1920.

Sec. 8. It is not intended in this decision to include or

fix rates for any officials of the carriers affected except that class designated in the Transportation Act of 1920, as "Subordinate Officials," and who are included in the act as within the jurisdiction of this Board. The Act provides that the term "Subordinate Officials" includes officials of carriers of such class or rank as the Interstate Commerce Commission shall designate by regulation duly formulated and issued. Hence, whenever in this decision words are used, such as "foremen", "supervisor", etc., which may apply to officials, such words are intended to apply to only such classes of subordinate officials as are now or may hereafter be defined and classified by the Interstate Commerce Commission as such subordinate officials.

ARTICLE XIV—INTERPRETATION OF THIS DECISION.

Sec. 1. Should a dispute arise between the management and the employees of any of the carriers as to the meaning or intent of this decision, which cannot be decided in conference between the parties directly interested, such dispute shall be referred to the United States Railroad Labor Board in the manner provided by the Transportation Act, 1920.

Sec. 2. All such disputes shall be presented in a concrete joint signed statement setting forth: (1) the article of this decision involved, (2) the facts in the case, (3) the position of the employees, and (4) the position of the management thereon. Where supporting documentary evidence is used it shall be attached in the form of exhibits.

Sec. 3. Such presentations shall be transmitted to the Secretary of the United States Railroad Labor Board who shall place same before the Board for final disposition.

By order of

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON,
Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

UNITED STATES RAILROAD BOARD
5 North Wabash Avenue,
Chicago, Illinois.

April 1, 1922.

Dockets 1, 2 and 3.

I hereby certify that Decision No. 119, Dockets 1, 2 and 3, dated April 14th, 1921, International Association of Machinists et al versus the Atchison, Topeka & Santa Fe Railway, et al. hereto attached, is a true copy of the Decision so entitled rendered by the United States Railroad Labor Board.

L. M. PARKER
Secretary, U. S. Railroad Labor Board.

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

Seal GERTRUDE M. DILL
My commission expires August 28, 1924.

I, R. M. Barton, Chairman of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent, is the Secretary of the United States Railroad Labor Board.

R. M. BARTON
Chairman, U. S. Railroad Labor Board.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

Seal GERTRUDE M. DILL
My commission expires August 28, 1924.

46 A true copy. L. M. Parker Secretary U. S. R. R. Labor Board.

EXHIBIT NO. 2.

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois,

April 14, 1921.

Decision No. 119 (Dockets 1, 2 and 3).

International Association of Machinists,
Amalgamated Sheet Metal Workers International Alliance,
Brotherhood of Locomotive Engineers,
Brotherhood of Railroad Trainmen,
Brotherhood of Railway & Steamship Clerks, Freight Han-
dlers, Express and Station Employes,
Switchmen's Union of North America,
International Brotherhood of Firemen and Oilers,
Brotherhood Railroad Signalmen of America,
Railway Employes' Department, A. F. of L.,
United Brotherhood of Maintenance of Way Employes and
Railway Shop Laborers,
Order of Railroad Telegraphers,
Brotherhood Railway Carmen of America,
International Brotherhood of Electric Workers,
Brotherhood of Locomotive Firemen and Enginemen,
Order of Railway Conductors,
International Brotherhood of Boilermakers, Iron Ship Build-
ers and Helpers of America,
International Brotherhood of Blacksmiths, Drop Forgers and
Helpers,
National Organization Masters, Mates and Pilots of Amer-
ica,
American Train Dispatchers Association,
International Association of Railroad Supervisors of Me-
chanics,

vs.

The Atchison, Topeka & Santa Fe Railway, et al.

This decision determines the undecided portion of the dis-
pute between the carriers and organizations of their em-

ployees referred to the Labor Board, April 16, 1920. That dispute was what should constitute reasonable wages and working conditions on the carriers parties thereto. On July 20, 1920, this Board decided the wage portion. It now decides upon a method of arriving at rules regulating working conditions.

The parties are set forth in Exhibit "A."

From December 28, 1917, to March 1, 1920, the President took over and operated through the Director General of Railroads the carriers parties to this dispute. On March 1st, pursuant to the Transportation Act, 1920, these carriers reverted to their owners.

During Federal control the Director General of Railroads entered into contracts with organizations of employees of these carriers. These contracts, called National Agreements, set out the classes of employees affected, define with particularity the grades in each class, specify work to be done by each grade, hours of service, when payments shall be made, how forces shall be reduced, seniority determined, work assigned, grievances adjusted, apprentices trained, and otherwise fix the rights and obligations of the parties as to working conditions. These agreements by their terms expired with Federal control. In the same period certain orders, supplements thereto and interpretations thereof, relating to wages and working conditions of railroad employees, were issued by the authority of the Director General. These orders, etc., among other things, classified positions, determined the duties and rights of the incumbents and fixed the wages to be paid such incumbents. These orders and supplements provided that they should be incorporated into existing agreements between railroads and their employees.

In February, 1920, the said organizations pressed long standing requests for wage increases on the Director General of Railroads who declined to act, as Federal control was almost at an end. On February 28th, the Transportation Act became law. Section 301 provides that all disputes between carriers and their employees shall be considered and, if possible, decided in conference between representatives of the parties and if there undecided, shall be referred for decision to the Railroad Labor Board created by the Act. Accordingly, the Association of Railway Executives appointed representatives of the carriers released from Federal control to confer with representatives of the organizations on the pending requests for wage increases.

The representatives met in Washington on March 10, 1920, On March 24th, the employees requested that the carriers' representatives secure authority to enter into an agreement preserving after September 1, 1920, the provisions of the general orders, supplements and addenda issued by the United States Railroad Administration as well as the National Agreements and interpretations thereof. On March 30th, the representatives of the carriers declined to request such authority.

No agreement was reached by the conference on any matter in dispute, and on April 16th the entire dispute was referred to the Labor Board.

On May 3, 1920, the organizations were informed by the Chairman of the Association of Railway Executives that the Association had taken the following action on the request for continuance of the National Agreements, orders, etc., of the Railroad Administration:

"That the matter of continuing national agreements, interpretations thereof and general orders and all other arrangements negotiated between the United States Railroad Administration and the so-called standard recognized labor organizations shall be handled by negotiation between the management and employees of each individual railway."

It was further stated that "this recommendation" had been conveyed to all the member roads of the Association.

Accordingly, the organizations arranged for the presentation about May 1, 1920, to each carrier of a request for 47 the continuance of the National Agreements, etc. Such requests were thereafter made on each carrier. Conferences on the requests were denied by the officers of the carriers in general on the ground that the matter had been referred to the Labor Board for decision.

In formulating Decision No. 2, the Labor Board perceived that to inquire into the justness and reasonableness of the National Agreements, etc., as well as to decide what shall constitute just and reasonable wages was impracticable. Time for such inquiry was lacking. Accordingly, at that time the matter of the National Agreements and of the orders, etc., of the United States Railroad Administration was thus disposed of:

"There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages. Adequate investigation and consideration of these questions would de-

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mand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason, it has been necessary,—and both parties to the controversy have indicated it to be their judgment and wish, that the Board should separate the questions involving rules and working conditions from the wage question. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise and this decision will be so understood and applied.

“The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration and determination of the questions pertaining to the continuation or modification of such rules, conditions and agreements no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions and agreements, further hearings will be had at the earliest practicable date and decisions thereon will be rendered as soon as adequate consideration can be given.”

On December 18, 1920, the parties were notified to present, beginning January 10, 1921, evidence and argument on this dispute.

The evidence and arguments submitted support the following conclusions:

The duty imposed by Section 301 on all carriers and their officers, employees and agents to consider and if possible to decide in conference all disputes between carriers and their employees has not been performed by the parties hereto either with regard to the wage or the working conditions portion of this dispute. The record shows that the representatives of the carriers were unwilling to assume the responsibility of agreeing to substantial wage increases. Hence, the conference of March 10th to April 1st, 1920, on the side of the carriers was merely a perfunctory performance of the statute. Nor was the action of the organizations with regard to the individual carriers more than perfunctory. Naked presentation as irreducible demands of elaborate wage scales carrying substantial increases, or of voluminous forms of contract regulating working conditions, with instructions to sign on the dotted line, is not a performance of the obligation to de-

Exhibit No. 2—Certified Copy of Decision No. 119. 73

cide disputes in conference if possible. The statute requires an honest effort by the parties to decide in conference. If they cannot decide all matters in dispute in conference, it is their duty to there decide all that is possible and refer only the portion impossible of decision to this Board.

Although Section 301 has not been complied with by the parties, the Board has jurisdiction of this dispute as it is and has been one likely substantially to interrupt commerce.

The carriers' parties hereto maintain that the direction of this Board in Decision No. 2, extending the National Agreements, orders, etc., of the Railroad Administration as a modus vivendi should be terminated at once; and that the matter should be remanded to the individual carriers and their employees for negotiation and individual agreement.

The organizations maintain that the National Agreements, orders, etc., with certain modifications desired by the employees should be held by this Board to constitute just and reasonable rules; and should be applied to all carriers parties to the dispute, except to the extent that any carrier may have entered into other agreements with its employees. They maintain that local conferences requiring necessarily the participation of thousands of railroad employees for several weeks would constitute an economic waste and would produce a multiplicity of controversies as well as irritation and disturbance. They also urge that to require local conferences would be to expose the local organizations on the several carriers to the entire power and weight of all the carriers acting through the Association of Railway Executives on the conferring carrier, that such a disparity of force would produce an inequitable result highly provocative of discontent and likely to result in traffic interruptions. They, accordingly, insist that the conference should be national.

The carriers maintain that rules negotiated by the employees and officers who must live under them are most satisfactory, that the participants in such negotiations know the intent of the rules agreed to and advise their fellow workmen and officers accordingly thereby avoiding a litigious attitude on both sides, that substantial differences exist between the several carriers with relation to the demands of the service, necessary division of labor and other factors which differences should be reflected in the rules, that these local differences can be given proper consideration only by local conferences. The carriers refuse to confer nationally.

The Labor Board is of the opinion that there is merit in the contentions of each party and has endeavored to take

action which will secure some of the advantages of both courses.

This Board is unable to find that all rules embodied in the National Agreements, orders, etc., of the Railroad Administration constitute just and reasonable rules for all carriers parties to the dispute. It must, therefore, refuse the indefinite extension of the National Agreements, orders, etc., on all such carriers as urged by the employees.

This Board also deems it inadvisable to terminate at once its direction of Decision No. 2 and to remand the dispute 48 to the individual carriers and their employees. Such a course would leave many carriers and their employees without any rules regulating working conditions.

If the Labor Board should remand the dispute to the individual carriers and their employees and should keep the direction of Decision No. 2 in effect until agreements should be arrived at, it is possible that agreements might not be arrived at.

The Labor Board believes nevertheless that certain subject matters now regulated by rules of the National Agreements, orders, etc., are local in nature and require consideration of local conditions. It also believes that other subject matters now so regulated are general in character and that substantial uniformity in rules regulating such subject matters is desirable.

The Board also believes that certain rules are unduly burdensome to the carriers and should in justice be modified. It may well be that other rules should be modified in the interest of employees.

To secure the performance of the obligation to confer on this dispute, imposed by law on officers and employees of carriers, to bring about the recognition in rules of differences between carriers where substantial, to preserve a degree of uniformity in rules regulating subject matters of a general nature, to prevent to some extent the operation in negotiations of a possible disparity of power as between the carriers and their employees, and to enable the representatives of employees of each carrier and the officers of that carrier to participate in the formulation of rules under which they must live, the Labor Board has determined upon the following action:

DECISION.

1. The direction of the Labor Board in Decision No. 2, extending the rules, working conditions and agreements in

force under the authority of the United States Railroad Administration, will cease and terminate July 1, 1921.

2. The Labor Board calls upon the officers and system organizations of employees of each carrier, parties hereto, to designate and authorize representatives to confer and to decide so much of this dispute relating to rules and working conditions as it may be possible for them to decide. Such conferences shall begin at the earliest possible date. Such conferences will keep the Labor Board informed of final agreements and disagreements to the end that this Board may know prior to July 1, 1921, what portion of the dispute has been decided. The Labor Board reserves the right to terminate its direction of Decision No. 2 at an earlier date than July 1st, with regard to any class of employees of any carrier if it shall have reason to believe that such class of employees is unduly delaying the progress of the negotiations. The Board also reserves the right to stay the termination of the said direction to a date beyond July 1, 1921, if it shall have reason to believe that any carrier is unduly delaying the progress of the negotiations. Rules agreed to by such conferences should be consistent with the principles set forth in Exhibit "B," hereto attached.

3. The Labor Board will promulgate such rules as it determines just and reasonable as soon after July 1, 1921, as is reasonably possible and will make them effective as of July 1, 1921, and applicable to those classes of employees of carriers parties hereto for whom rules have not been arrived at by agreement.

4. The hearings in this dispute will necessarily proceed in order that the Labor Board may be in position to decide with reasonable promptness rules which it may be necessary to promulgate under Section 3 above.

5. Agreements entered into since March 1, 1920, by any carrier and representatives of its employees shall not be affected by this decision.

By order of

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON,
Chairman.

Attest:

C. P. CARRITHERS,

Secretary.

Attachments—Exhibit "A"
—Exhibit "B"

EXHIBIT "A"

List of Organizations and carriers parties to Decision
No. 119

(Dockets 1, 2 and 3)

1. Carriers

Abilene & Southern Railway.

Alabama & Vicksburg Railway.

Alton & Southern Railroad.

American Railway Express Company.

(As to employees coming under the provisions of the
Agreement between the United States Railroad Adminis-
tration and the Federated Shop Crafts, dated Septem-
ber 20, 1919.)

American Refrigerator Transit Company.

Ann Arbor Railroad.

Manistique & Lake Superior Railroad.

Atchison, Topeka & Santa Fe Railway.

Beaumont Wharf & Terminal Company.

Kansas South Western Railway.

Grand Canyon Railway.

Gulf Colorado & Santa Fe Railway.

Rio Grande, El Paso & Santa Fe Railroad.

Panhandle & Santa Fe Railway.

Atlanta & West Point Railroad.

Western Railway of Alabama.

Georgia Railroad.

Atlanta, Birmingham & Atlantic Railway.

Atlanta Joint Terminals.

Atlantic Coast Line Railroad.

Washington & Vandemere Railroad.

Baltimore & Ohio Railroad.

Baltimore & Ohio Chicago Terminal Railroad.

Coal & Coke Railroad.

Dayton Union Railroad.

Sandy Valley & Elkhorn Railway.

Sharpsville Railroad.

Staten Island Rapid Transit Company.

49 Bankor & Aroostook Railroad.

Bessemer & Lake Erie Railroad.

Boston Terminal Company.

Boston & Maine Railroad.
Barre & Chelsea Railroad.
Montpelier & Wells River Railroad.
St. Johnsbury & Lake Champlain Railroad.
Sullivan County Railroad.
Vermont Valley Railroad.
York Harbor & Beach Railroad.
Buffalo Creek Railroad.
Buffalo & Susquehanna Railroad.
Buffalo, Rochester & Pittsburgh Railway.
Camas Prairie Railroad.
Canadian Pacific Railway Company.
Carolina, Clinchfield & Ohio Railway.
Carolina, Clinchfield & Ohio Railway of South Carolina.
Central New England Railway.
Central of Georgia Railway.
Wadley Southern Railway.
Sylvania Central Railway.
Central Railroad of New Jersey.
Central Vermont Railway.
Central Vermont Trans. Company.
Charleston & Western Carolina Railway.
Chesapeake & Ohio Railway.
Chesapeake & Ohio Railway of Indiana.
Chicago & Alton Railroad.
Chicago & Eastern Illinois Railroad.
Chicago & North Western Railway.
Pierre & Fort Pierre Bridge Railway Company.
Pierre, Rapid City & Northwestern Railway.
Wyoming & North Western Railway.
Missouri Valley & Blair Railway & Bridge Company.
Chicago, Burlington & Quincy Railroad.
Quincy, Omaha & Kansas City Railroad.
Chicago Great Western Railroad.
Chicago, Indianapolis & Louisville Railway.
Chicago, Milwaukee & Gary Railway Company.
Chicago, Milwaukee & St. Paul Railway.
Bellingham & Northern Railroad.
Gallatin Valley Railroad.
Milwaukee Terminal Railway.
Puget Sound & Willapa Harbor Railroad.
Tacoma Eastern Railroad.
Seattle, Port Angeles & Western Railroad.
Chicago, Peoria & St. Louis Railroad.

Chicago, Rock Island & Pacific Railway.

Chicago, Rock Island & Gulf Railway.

Chicago, St. Paul, Minneapolis & Omaha Railway.

Chicago, Terre Haute & Southeastern Railway.

Cincinnati, Indianapolis & Western Railroad.

Colorado & Southern Railway.

Wichita Valley Railway.

Colorado & Wyoming Railway.

Cumberland & Pennsylvania Railroad.

Davenport, Rock Island & Northwestern Railway.

Delaware & Hudson Company.

Delaware, Lackawanna & Western Railroad.

Lackawanna & Montrose Railroad.

Sussex Railroad.

Denver & Rio Grande Railroad.

Dio Grande Southern Railroad.

Denver & Salt Lake Railroad.

Detroit, Toledo & Ironton Railroad.

Duluth, South Shore & Atlantic Railway.

Mineral Range Railroad.

Elgin, Joliet & Eastern Railway.

El Paso & Southwestern Company.

Morenci Southern Railway.

Erie Railroad System.

Bath & Hammondsport Railroad.

Chicago & Erie Railroad.

New Jersey & New York Railroad.

New York, Susquehanna & Western Railroad.

Wilkes-Barre & Eastern Railroad.

Florida East-Coast Railway.

Fort Worth & Denver City Railway.

Galveston Wharf Company.

Georgia, Florida & Alabama Railway.

Grand Trunk System—Lines in U. S.

Atlantic & St. Lawrence Railroad.

Champlain & St. Lawrence Railroad.

Chicago, Detroit & Canada Grand Trunk Junction Railroad.

Cincinnati, Saginaw & Mackinaw Railroad.

Detroit, Grand Haven & Milwaukee Railroad.

Grand Trunk Western Railway.

Lewiston & Auburn Railroad.

Michigan Air Line Railway.

Pontiac, Oxford & Northern Railroad.

St. Clair Terminal Railroad.

Toledo, Saginaw & Muskegon Railroad.
United States & and Canada Railroad.
Great Northern Railway.
Duluth Terminal Railway.
Duluth & Superior Bridge Company.
Minneapolis Western Railway.
Watertown & Sioux Falls Railroad.
Farmers Grain & Shipping Company's Railroad.
Gulf & Ship Island Railroad.
Gulf Coast Line.
New Orleans, Texas & Mexico Railway.
St. Louis, Brownsville & Mexico Railway.
Beaumont, Sour Lake & Western Railway.
Orange & Northwestern Railroad.
Gulf, Mobile & Northern Railroad.
Hocking Valley Railway.
Huntington & Broad Top Mountain Railroad.
Illinois Central Railroad.
Chicago, Memphis & Gulf Railroad.
Dunleith & Dubuque Bridge Company.
Yazoo & Mississippi Valley Railroad.
Illinois Terminal Railroad.
International & Great Northern Railway.
Jacksonville Terminal Company.
Kansas City, Clinton & Springfield Railway.
Kansas City, Mexico & Orient Railroad.
Kansas City, Mexico & Orient Railway of Texas.
Kansas City Southern Railway.
Kansas, Oklahoma & Gulf Railway.
Lehigh & New England Railroad.
Lehigh Valley Railroad.
Los Angeles & Salt Lake Railroad.
Louisiana & Arkansas Railway.
Louisville & Nashville Railroad.
Louisville, Henderson & St. Louis Railway.
Maine Central Railroad.
Midland Valley Railroad.
Minneapolis & St. Louis Railroad.
Minneapolis, St. Paul & Sault Ste. Marie Railway.
Mississippi Central Railroad.
Missouri, Kansas and Texas Railway.
Missouri, Kansas & Texas Railway of Texas.
Wichita Falls & Northwestern Railway.
Missouri & North Arkansas Railroad Company.
Missouri Pacific Railroad.

Monongahela Railway.
Nashville, Chattanooga & St. Louis Railway.
Nevada Northern Railway.
New Orleans, Great Northern Railroad.
New York Central Lines.
Boston & Albany Railroad.
Chicago, Kalamazoo & Saginaw Railway.
Cincinnati Northern Railroad.
Cleveland, Cincinnati, Chicago & St. Louis Railway.
Evansville & Indianapolis Railroad.
Muncie Belt Railway.
Indiana Harbor Belt Railroad.
Kanawha & Michigan Railway.
Kanawha & West Virginia Railroad.
Kankakee & Seneca Railroad.
Lake Erie & Western Railroad.
Michigan Central Railroad.
New York Central Railroad.
Pittsburgh & Lake Erie Railroad.
Rutland Railroad.
Toledo & Ohio Central Railroad.
Zanesville & Western Railroad.
New York, Chicago & St. Louis Railroad.
New York, New Haven & Hartford Railroad.
New York, Ontario & Western Railway.
Norfolk & Portsmouth Belt Line Railroad.
Norfolk & Western Railway.
Virginia-Carolina Railroad.
New River, Holston & Western Railroad.
Williamson & Pond Creek Railroad.
Tug River & Kentucky Railroad.
Norfolk Southern Railroad.
Northern Pacific Railway.
Gillmore & Pittsburgh Railroad.
Big Fork & International Falls Railroad.
Minnesota & International Railway.
Northern Pacific Terminal Company of Oregon.
Northwestern Pacific Railway.
Ogden Union Railway & Depot Company.
Pennsylvania Lines:
Baltimore & Sparrows Point Railroad.
Baltimore, Chesapeake & Atlantic Railway.
Barnegat Railroad.
Cape Charles Railroad.
Cincinnati, Lebanon & Northern Railway.

Cornwall & Lebanon Railroad.
Connecting Terminal Railroad.
Cumberland Valley Railroad.
Grand Rapids & Indiana Railway.
Long Island Railroad.
Lorain, Ashland & Southern Railroad.
Louisville Bridge & Terminal Railway.
50 Manufacturers Railway.
Maryland, Delaware & Virginia Railway.
New York, Philadelphia & Norfolk Railroad.
Ohio River & Western Railway.
Pennsylvania Company.
Pennsylvania Railroad.
Pennsylvania Terminal Railway.
Philadelphia & Beach Haven Railroad.
Pittsburgh, Cincinnati, Chicago & St. Louis Railroad.
Rosslyn Connecting Railroad.
Union Railroad Company of Baltimore.
Waynesburg & Washington Railroad.
West Jersey & Seashore Railroad.
Wheeling Terminal Railway.
Pere Marquette Railway.
Philadelphia & Reading Railway.
Atlantic City Railroad.
Catasauqua & Fogelsville Railroad.
Chester & Delaware River Railroad.
Gettysburg & Harrisburg Railway.
Middletown & Hummelstown Railroad.
Northeast Pennsylvania Railroad.
Perkiomen Railroad.
Philadelphia & Chester Valley Railroad.
Philadelphia, Newton & New York Railroad.
Pickering Valley Railroad.
Port Reading Railroad.
Reading & Columbia Railroad.
Rupert & Bloomsburg Railroad.
Stony Creek Railroad.
Tamaqua, Hazelton & Northern Railroad.
Williams Valley Railroad.
Pittsburg & Shawmut Railroad.
Pittsburgh & West Virginia Railway.
Pullman Company.
Richmond, Fredericksburg & Potomac Railroad.
Washington Southern Railway.
St. Joseph Belt Railway.

St. Joseph & Grand Island Railway.
St. Louis & O'Fallon Railway.
St. Louis Refrigerator Car Company.
St. Louis-San Francisco Railway.
Brownwood North & South Railway.
Fort Worth & Rio Grande Railway.
Paris & Great Northern Railroad.
St. Louis, San Francisco & Texas Railway.
St. Louis Southeastern Railway Lines.
Eastern Texas Railroad.
Pine Bluff & Arkansas River Railway.
St. Louis Southwestern Railway of Texas.
San Antonio, Uvalde & Gulf Railway Company.
San Antonio & Arkansas Pass Railway.
San Diego & Arizona Railway.
Seaboard Air Line Railway.
Chesterfield & Lancaster Railroad.
South Buffalo Railway.
Southern Railway System.
Cincinnati, New Orleans & Texas Pacific Railroad Company.
Alabama Great Southern Railroad.
New Orleans & Northwestern Railroad.
Harriman & Northeastern Railroad.
Cincinnati, Burnside & Cumberland River Railway.
Northern Alabama Railway.
Georgia, Southern & Florida Railway.
Mobile & Ohio Railroad Company.
Southern Pacific Company.
Arizona Eastern Railroad.
Galveston, Harrisburg & San Antonio Railway.
Houston & Shreveport Railroad.
Houston & Texas Central Railroad.
Houston, East & West Texas Railway.
Iberia & Vermillion Railroad.
Lake Charles & Northern Railroad.
Louisiana & Western Railroad.
Morgan's Louisiana & Texas Railroad Steamship Company.
Texas & New Orleans Railroad.
Spokane, Portland & Seattle Railroad.
Oregon Electric Railway.
Oregon Trunk Railway.
Tennessee Central Railroad.
Texarkana & Ft. Smith Railway.

Texas Midland Railroad.
Texas & Pacific Railway.
Dennison & Pacific Suburban Railway.
Weatherford, Mineral Wells & Northwestern Railway.
Toledo, Peoria & Western Railway.
Toledo, St. Louis & Western Railroad.
Trans-Mississippi Terminal Railroad.
Trinity & Brazos Valley Railway.
Ulster & Delaware Railroad.
Union Pacific Railroad.
Oregon Short Line Railroad.
Oregon-Washington Railroad & Navigation Company.
Union Stock Yards of Omaha.
Vicksburg, Shreveport & Pacific Railway.
Virginian Railway.
Wabash Railway.
West Side Belt Railroad.
Western Maryland Railway.
Western Pacific Railroad.
Western Railway of Alabama.
Wheeling & Lake Erie Railway.
Winston-Salem Southbound Railway.
Cumberland & Pennsylvania Railroad.
Monongahela Railway.

All Union Depot and Terminal Companies, a majority of whose stock is owned by railroads enumerated above.

2. Organizations.

International Association of Machinists,
Amalgamated Sheet Metal Workers International Alliance,
Brotherhood of Locomotive Engineers,
Brotherhood of Railroad Trainmen,
Brotherhood of Railway & Steamship Clerks, Freight Handlers, Express and Station Employes,
Switchmen's Union of North America,
International Brotherhood of Firemen and Oilers,
Brotherhood Railroad Signalmen of America,
Railway Employes' Department A. F. of L.,
United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers,
Order of Railroad Telegraphers,
Brotherhood Railway Carmen of America,
International Brotherhood of Electrical Workers,
Brotherhood of Locomotive Firemen and Enginemen,

Order of Railway Conductors,
International Brotherhood of Boilermakers, Iron Ship Builders and Helpers of America,
International Brotherhood of Blacksmiths, Drop Forgers and Helpers,
National Organization of Masters, Mates and Pilots of America,
American Train Dispatchers Association,
International Association of Railroad Supervisors of Mechanics.

EXHIBIT "B"

Exhibit referred to in Decision No. 119
(Dockets 1, 2 and 3)

Principles**1.**

An obligation rests upon management, upon each organization of employees, and upon each employee to render honest, efficient and economical service to the carrier serving the public.

2.

The spirit of co-operation between management and employees being essential to efficient operation, both parties will so conduct themselves as to promote this spirit.

3.

Management having the responsibility for safe, efficient and economical operation, the rules will not be subversive of necessary discipline.

4.

The right of railway employees to organize for lawful objects shall not be denied, interfered with or obstructed.

5.

The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management.

6.

No discrimination shall be practiced by management as between members and non-members of organizations or as between members of different organizations, nor shall members of organizations discriminate against non-members or use other methods than lawful persuasion to secure their membership. Espionage by carriers on the legitimate activities of labor organizations or by labor organizations on the legitimate activities of carriers should not be practiced.

7.

The right of employees to be consulted prior to a decision of management adversely affecting their wages or working conditions shall be agreed to by management. This right of participation shall be deemed adequately complied with, if and when the representatives of a majority of the employees of each of the several classes directly affected shall have conferred with the management.

8.

No employee should be disciplined without a fair hearing by a designated officer of the carrier. Suspension in proper cases pending a hearing, which shall be prompt, shall not be deemed a violation of this principle. At a reasonable time prior to the hearing he is entitled to be apprised of the precise charge against him. He shall have reasonable opportunity to secure the presence of necessary witnesses and shall have the right to be there represented by a counsel of his choosing. If the judgment shall be in his favor, he shall be compensated for the wage loss, if any, suffered by him.

9.

Proper classification of employees and a reasonable definition of the work to be done by each class for which just and reasonable wages are to be paid is necessary, but shall not unduly impose uneconomical conditions upon the carriers.

10.

Regularity of hours or days during which the employee is to serve or hold himself in readiness to serve is desirable.

11.

The principle of seniority long applied to the railroad service is sound and should be adhered to. It should be so applied as not to cause undue impairment of the service.

12.

The Board approves the principle of the eight-hour day, but believes it should be limited to work requiring practically continuous application during eight hours. For eight hours' pay eight hours' work should be performed by all railroad employees except engine and train service employees, regulated by the Adamson Act, who are paid generally on a mileage basis as well as on an hourly basis.

13.

The health and safety of employees should be reasonably protected.

14.

The carriers and the several crafts and classes of railroad employees have a substantial interest in the competency of apprentices or persons under training. Opportunity to learn any craft or occupation shall not be unduly restricted.

15.

The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.

16.

Employees called or required on to report for work, and reporting but not used, should be paid reasonable compensation therefor.

UNITED STATES RAILROAD LABOR BOARD
5 North Wabash Avenue,
Chicago, Illinois.

April 1, 1922.

Dockets 1, 2 and 3.

I hereby certify that Addendum No. 2, to Decision No. 119, Dockets 1, 2 and 3, International Association of Machinists et al versus the Atchison, Topeka and Santa Fe Railway et al, hereto attached, is a true copy of the Addendum so entitled rendered by the United States Railroad Labor Board.

L. M. PARKER
Secretary, U. S. Railroad Labor Board.

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL.
(Seal) My Commission expires August 28, 1924.

I, R. M. Barton, Chairman of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent, is the Secretary of the United States Railroad Labor Board.

R. M. BARTON.
Chairman, U. S. R. R. Labor Board.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL.
(Seal) My Commission expires August 28, 1924.

EXHIBIT NO. 3.

A true copy L. M. Parker, Secretary U. S. R. R. Labor Board.

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois

June 27, 1921

Addendum No. 2 To Decision No. 119 (Dockets 1, 2 and 3)
Decision No. 119 (Dockets 1, 2 and 3)—International Association of Machinists et al vs. Atchison Topeka & Santa Fe Railway et al.

Entry—Modifying Decision No. 119 with Respect to Rules Governing Compensation for Overtime and Continuing Temporarily Certain Other Rules Established by or Under the Authority of the United States Railroad Administration.

In Decision No. 119 the Labor Board determined that portion of a dispute referred to it on April 16, 1920, relating to rules and working conditions. The history of the dispute is set forth in that decision. In the decision the Board terminated (effective July 1, 1921) its direction in Decision No. 2 extending the rules, working conditions and agreements in force under the authority of the United States Railroad Administration, and called upon the officers and system organizations of employees of each carrier, parties thereto, to designate and authorize representatives to confer and to decide so much of the dispute relating to rules and working conditions as it might be possible for them to decide—such conferences to keep the Board informed of final agreements and disagreements, to the end that the Board might know, prior to July 1, 1921, what portion of the dispute had been decided.

The decision also provided that the Labor Board would promulgate such rules as it determined should be just and reasonable as soon after July 1, 1921, as would be reasonably possible and would make them effective as of July 1, 1921, and applicable to those classes of employees of carriers, parties to the dispute, for whom rules had not been arrived at by agreement.

Reports of the results of conferences held in accordance with the direction contained in Decision No. 119 have been and are now being received in considerable number. In some instances the carriers and the employees have reached an agreement upon all rules. In a considerable number of instances there remain certain rules upon which no agreement has been reached, while in others, conferences have not as yet been begun. Under these circumstances, in order that no misunderstanding may exist or unnecessary controversy arise, it appears necessary, purely as a Modus Vivendi, that the Labor Board establish a uniform policy to be pursued with regard to the undecided rules until such time as it is possible to make a decision.

In the available reports from the conferences held in accordance with the direction contained in Decision No. 119, it is found that the principal rules still the subject of dispute are those governing the payment of overtime. The Labor Board directs as follows, effective July 1, 1921, with the understanding that if the rules promulgated by the Labor Board to be effective July 1st are more favorable to the employees, adjustment in compensation due to the employees will be made by the carrier:

1. All overtime in excess of the established hours of service shall be paid for at the pro rata rate; provided, that this will not affect classes of employees of any carrier which have reached an agreement as to overtime rates, nor classes of employees of any carrier who by agreement or practice were receiving a rate higher than pro rata prior to the promulgation of any general order of the United States Railroad Administration relating to wages and working conditions. Inasmuch as this Board has not as yet given consideration to any dispute on overtime rates, this order should not be construed to indicate the final action and decision of the Labor Board on disputes as to overtime rates which have been or may be referred to the Board.

2. In lieu of any other rules not agreed to in the conferences held under Decision No. 119, the rules established by or under the authority of the United States Railroad Administration are continued in effect until such time as such rules are considered and decided by the Labor Board.

3. This direction shall not be understood to modify Decision No. 119 in any respect other than is specifically provided for herein.

4. Rules agreed upon by carriers and employees to be effective as of July 1, 1921.

By order of

UNITED STATES RAILROAD LABOR BOARD,

R. M. BARTON,

Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

No. III.

UNITED STATES RAILROAD LABOR BOARD

5 North Wabash Avenue,

Chicago, Illinois.

April 1, 1922.

Docket No. 404.

I hereby certify that Decision No. 218, Docket No. 404, dated July 26th, 1921, Railway Employees' Department A. F. of L. (Federated Shop Crafts) vs. The Pennsylvania System, hereto attached, is a true copy of the decision so entitled rendered by the United States Railroad Labor Board.

L. M. PARKER,
Secretary, U. S. R. R. Labor Board

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL

(Seal) My commission expires August 28th, 1924.

I, R. M. Barton, Chairman of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent, is the Secretary of the United States Railroad Labor Board.

R. M. BARTON.

Chairman, U. S. Railroad Labor Board.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL

(Seal) My commission expires August 28th, 1924.

EXHIBIT NO. 4.

UNITED STATES RAILROAD LABOR BOARD

Chicago Illinois

July 26, 1921

Decision No. 218 (Docket 404)

Railway Employes' Department, A. F. of L.
(Federated Shop Crafts)

vs.

Pennsylvania System.

Chicago, Illinois:

Post Office Printing Office

1921

No. IV.

A true copy. L. M. Parker, Secretary U. S. R. R. Labor Board.

UNITED STATES RAILROAD LABOR BOARD

R. M. Barton, Chairman.
Ben W. Hooper, Vice-Chairman.
Horace Baker.
J. H. Elliott.
G. W. W. Hanger.
Samuel Higgins.
W. L. McMenimen.
Albert Phillips.
A. O. Wharton.
C. P. Carrithers, Secretary.

54 UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois

July 26, 1921.

Decision No. 218 (Docket 404)

Railway Employes' Department, A. F. of L.
(Federated Shop Crafts)

vs.

Pennsylvania System.

Nature of the Proceeding.

The Federated Shop Crafts of the Pennsylvania System have made an ex parte submission to the Railroad Labor Board of a dispute involving, in substance, the following questions:

1. Has a majority of the employees of any craft on the Pennsylvania System the right to designate an organization to represent said employees in negotiating an agreement with the carrier covering rules and working conditions?
2. Has a majority of the employees of such craft the right to be represented in such negotiations by any one other than an employee of said carrier?
3. Has the carrier complied with the law in the method pursued by it to ascertain who are the representatives of the shop employees with whom it shall negotiate rules?

To said submission of the Federated Shop Crafts, the carrier filed its answer and the dispute has been orally presented by both parties to the Labor Board.

Statement of Facts.

Prior to the conference referred to below employees in the several shop crafts of the carrier, belonging to System Federation No. 90 affiliated with the Railway Employes' Department of the American Federation of Labor, duly elected their general chairmen who, under the rules of the organization, were authorized to negotiate on matters in dispute between the carrier and the employees.

These officers met representatives of the carrier in confer-

ence on May 24, 1921. At this conference the officers stated that they represented the majority of the employees in the shop crafts on the Pennsylvania System and were prepared to negotiate rules in accordance with Decision No. 119, of the Railroad Labor Board.

The representatives of the carrier refused to negotiate with these officers on the ground that there was not satisfactory proof that the system federation actually represented a majority of the employees in question. In order to procure evidence as to whom the majority actually wished to have represent them, the representatives of the carrier announced that they had already prepared and proposed to send out a ballot upon which all shop-craft employees should designate their representatives.

The representatives of the employees comprising System Federation No. 90 objected to this ballot on the ground: (1) that the system federation did represent a majority of the employees in the shop crafts, which the carrier did not deny, and that therefore the proposal to take a ballot involved unnecessary delay; (2) that the proposed ballot was not in accordance with the law in that it not only failed to permit employees to vote for an organization, but required them to designate individuals; (3) because it provided that the individuals so designated must be employees of the carrier; and (4) because it provided that the employees be represented regionally rather than from the system as a whole.

The officers of System Federation No. 90 proposed to the representatives of the carrier that they so amend the ballot as to allow employees to vote for an organization if they so desired. This proposal being declined, the officers refused to approve the ballot.

Thereupon the officers of System Federation No. 90 issued a ballot of their own to all shop-craft employees, whom, in supplementary notices, they warned against voting the company's ballot on the ground that it was illegal, and calling upon them to vote for System Federation No. 90 as their representative. This ballot gave the employees the opportunity to vote for the system federation and left a blank for any other organization which the employee might prefer, but it did not permit him to vote for an individual.

This controversy resulted in two separate elections. The carrier recognized the result of the election which it conducted and is negotiating rules with the representatives chosen in said election.

It is contended by the system federation, and not denied by the carrier, that the majority of the employees in the shop crafts did not vote for the representatives whom the company has recognized and with whom it is conducting negotiations. The company replies that it is immaterial whether a majority of all the employees expressed a preference for these representatives, since they all had an opportunity to vote in the election held by the carrier, and under such circumstances it is the majority of those voting which counts.

The carrier further contends that the Board had not acquired jurisdiction in a lawful manner over the dispute regarding rules and working conditions when Decisions No. 2 and No. 119 were rendered.

The Labor Board acquired such jurisdiction, but that question is not of prime importance in this case.

Opinion.

It matters not whether the carrier, in its recent efforts to negotiate rules, was proceeding under the order of the Labor

Board in Decision No. 119, or whether it was proceeding 55 under the Transportation Act itself, as it claims. The fact remains that both the carrier and its employees were taking steps to hold conferences for the negotiation of rules, that a dispute arose at the very outset in the conference between the carrier and the representatives of the employees who constitute System Federation No. 90, and that this dispute is now before the Board.

The question involved is one necessarily incident to the negotiation of rules and within the unquestioned jurisdiction of the Board. It is quite obvious that no conference could ever be held and no rules ever agreed upon, if either party could block the proceedings by declining to deal with the other upon any ground or pretext.

For the purposes of this case, the arguments of the parties pro and con as to the regularity and validity of Decision No. 119 are of secondary importance. The questions involved arise directly from the Transportation Act itself and are properly before this Board for disposition.

It is not questioned by either party that the Transportation Act contains the following provisions applicable to this dispute:

1. "It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and

adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.

2. "All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute.

3. "The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions * * * upon the application of the chief executives of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute.

4. "The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title." (Referring to "Title III—Disputes Between Carriers and Their Employees and Subordinate Officials," of the Transportation Act, 1920.)

In the case under consideration, the matter in dispute was the adoption of a schedule of rules and working conditions for the shop crafts on the Pennsylvania System. Both the carrier and the employees were taking steps to hold the conference required by the Transportation Act, and directed by Decision No. 119. Naturally the question arising at the very threshold of the negotiations was: Who are the accredited representatives of this class of employees for the purposes of the proposed conference? The carrier had the right to know this fact, just as the employees had the right to know that they were dealing with the properly authorized representatives of the carrier.

It is true that the Federated Shop Crafts claim that the carrier knew that their organization constituted a majority of that class of employees, and that the carrier was not in good faith in refusing to deal with their representatives. This Board cannot enter into the motives of the parties. The carrier did not deny that said organization comprised a majority of that class of employees, but merely stated that no evidence of the fact had been furnished to the carrier.

It is evident that since the statute provides that the employees interested in the dispute be represented in such a conference by representatives "designated and authorized" by said employees, it necessarily follows, under our system

of government, that a majority of such employees would have the right to designate their representatives.

The Transportation Act does not prescribe any method by which the employees shall elect their representatives for such conference. Both the carrier and the employees in this case correctly concluded that an election by ballot would be necessary. It was at the next step that both parties fell into error.

The carrier had no more right to undertake to assume control of the selection of the representatives of the employees than the employees would have had to supervise the naming of the representatives of the carrier, for the statute plainly provides that the employees shall "designate and authorize" their representatives. In this sophisticated land of popular elections, no political party would submit to having its primary held and managed by the opposing party. It is entirely proper, however, that the carrier should keep in close touch with said election, and should be given every facility for first hand knowledge of the manner in which it is conducted and the correctness of the result reached and announced.

The carrier was not justified in refusing the request of the employees to place on the ticket the name of the organization. The granting of this one request would have avoided all trouble, and nobody would have suffered any injury, because the name of any other organization or the names of individuals could have appeared on the ticket, and all employees, union and nonunion, would have had the right to vote. If a majority of the employees had not wanted to be represented by the organization, they would have had the unobstructed right to say so.

Representation by the organization is only representation by individuals after all. There is nothing in the statute to deny the employees the privilege of belonging to an organization and being represented by that organization through its accredited officers. In fact, this has been the established custom for many years and is recognized in the Transportation Act itself.

In excerpt No. 3 from the Transportation Act, above set out, the "chief executive of any organization of employees" is authorized to submit to the Labor Board any dispute where disagreements have occurred in the conference between the carrier and employees. The existence of the organization of employees is thus recognized as it is elsewhere in the statute.

The Labor Board also holds that the employees may vote

for representatives who are not employees of the carrier, if they so desire, just as the carrier may select a representative who is neither a director nor a stockholder. It is out of line with the customary procedure in this country to contend that a party to any suit or controversy in any court or tribunal shall be denied counsel and compelled to represent himself. It seems, however, that the employees in this instance were not asking to have the name of any outsider placed on the ballot, but simply the name of their organization, which would have resulted, as the carrier well know, in the employees being represented by the officers of the organization who are employees of the carrier.

The carrier had no legal authority to divide its system into regions and require the employees to elect regional representatives. The Transportation Act contemplates that the employees of the class directly interested on an entire system shall select representatives. It is easy to see how an arbitrary regional division of the employees by the carrier might be as unjust as it is unlawful.

After having failed to reach a satisfactory agreement with the carrier as to the ballot, the shop crafts put out a ballot of their own with no provision for any representatives to be voted for except organizations. This was not authorized by law and ignored the rights of the nonunion men.

Neither election, as held, was fair and legal. As a consequence of the failure of the parties to agree upon a method of holding an election, the employees have so far been denied their legal right to select their representatives for this important conference on rules. As evidence of the fact that no real test of the choice of the employees has been had, the carrier in its own presentation to this Board admits that, exclusive of the Altoona Shops, only 3,480 men voted, out of 33,104 entitled to vote, for the alleged representatives who are now negotiating rules. In other words, only 10.5 per cent of these employees are represented in these negotiations, and 89.5 per cent are virtually disfranchised. This is the big, outstanding uncontroverted fact presented in this case, and undoubtedly the law provides a remedy for such a wrong.

It is the duty of the Labor Board to settle this dispute by providing a method that will protect the legal rights of every employee, union and nonunion, to the end that the carrier and this class of employees may proceed to the orderly negotiation of rules.

Neither of the parties to this dispute can serve the country,

or justify themselves in the eyes of the public by any amount of propaganda, if they permit a controversy over small technicalities to interrupt commerce and bring loss and suffering to themselves and the public.

There is no question of the closed or open shop involved in this dispute and no other real matter of principle. The question involved is merely one of procedure.

At a time when the Nation is slowly and painfully progressing through the conditions of industrial depression, unemployment and unrest consequent upon the war, it is almost treasonable for any employer or employee to stubbornly haggle over nonessentials at the risk of social chaos.

Decision.

Under the authority of the Transportation Act, as herein-before cited, the Labor Board hereby declares that both of said elections on the Pennsylvania System were illegal and that rules negotiated by the alleged representatives selected by either ballot will be void and of no effect, and orders that a new election be held.

For the purpose of determining the choice of a majority of each of the respective crafts coming under the provisions of this decision the following shall govern:

Employees Eligible to Vote.

1-a. All machinists, apprentices, and helpers, as defined in and coming under the provisions of Decision No. 2 (Dockets 1, 2 and 3), issued by the United States Railroad Labor Board under date of July 20, 1920, in the service of the carrier, including Altoona Works, and including all employees coming under the provisions of this decision who have been laid off or furloughed and are entitled to return to the service, under the seniority rules, when the force is restored to what is generally recognized as constituting a normal force, if accessible, shall be furnished a ballot and be permitted to vote.

1-b. All boilermakers, apprentices, and helpers, same definition and conditions as set forth in preceding 1-a to apply.

1-c. All blacksmiths, apprentices, and helpers, same definition and conditions as set forth in preceding 1-a to apply.

1-d. All sheet metal workers, apprentices, and helpers, same definition and conditions as set forth in preceding 1-a to apply.

1-e. All electrical workers, apprentices, and helpers, same definition and conditions as set forth in preceding 1-a to apply.

1-f. All carmen, apprentices, and helpers, same definition and conditions as set forth in preceding 1-a to apply.

Conference and Representation.

A conference shall be held on or before August 10, 1921, at such place as the carrier may designate (of which due notice shall be given to all parties interested), between the duly authorized representatives of the carrier and the duly authorized representatives of System Federation No. 90; the duly authorized representatives of any other organization (representing the classes of employees set out in preceding 1-a to 1-f inclusive) whose by-laws or constitution establishes the fact that the organization was established for the purpose of performing the functions of a labor organization as contemplated in Title III of the Transportation Act, 1920; and the duly authorized representatives of one hundred or more unorganized employees, selected by the respective crafts set out in the preceding 1-a to 1-f inclusive, for the purpose of arriving at a clear understanding as to the distribution, casting, counting and tabulating of the ballots and announcing the results thereof.

Note:—Representatives of unorganized employees authorized and desiring to attend this conference must have the individual and personal signature and authorization of not less than one hundred employees of a single craft, such authorization shall likewise name the place of employment and craft to which each belongs.

The employees shall, at their own expense, have ballots and envelopes printed in sufficient numbers to provide each employee an opportunity to vote.

Six sets of ballots and envelopes shall be printed, a separate and distinct ballot for each craft as per the following, and only the craft named thereon shall be permitted to use the ballot:

Pennsylvania System
Machinists, Apprentices, and Helpers
Official Ballot.

A dispute exists between the carrier and System Federation No. 90 of the Railway Employes' Department of the A. F. of L., as to who the employees, in the craft above named, desire to be represented by in the conference to negotiate rules and working conditions.

The machinists, apprentices, and helpers, irrespective of membership or nonmembership in any organization, are therefore to be given an opportunity to designate, by a majority vote, the representation of their choice, as follows:

Those in favor of either of the following will designate their choice by marking an X in the square set out for that purpose.

Those who desire to be represented by System Federation No. 90, Railway Employes' Department of the A. F. of L., mark an X in this square.....

Those who desire to be represented by the American Federation of Railroad Workers, mark an X in this square

Those who desire to be represented by individuals or by any other organization, write the name of such individual or organization here.

.....
and mark an X in this square.....

Place employed

Craft

Actually working

Laid off or furloughed

Name of voter

If, in any craft, no organization or individual receives a majority of the legal votes cast, a second vote shall be taken in the same manner, and on the same kind of ballot, but the second ballot will contain only the names of the two organizations or individuals receiving the highest number of votes cast in the first election.

Voting.

The vote shall be taken by crafts, each craft to include mechanics, apprentices and helpers. A majority of each of the respective crafts shall have the right to determine by whom they desire to be represented; this right shall not be construed to mean that employees shall be denied the right to name an organization as their representative, neither shall it be construed to prevent the employees from naming an individual who is not an employee of the carrier.

Distribution, Voting and Counting.

A general committee, composed of duly authorized representatives of the carrier, duly authorized representatives of System Federation No. 90, and the duly authorized representatives of any other organization or one hundred or more unorganized employees participating in accordance with the provisions of this decision, will be located at designated places for the purpose of distributing, receiving, counting and tabulating the results of the ballot.

A local committee composed of the duly authorized representatives as above outlined will be established at each division point and at Altoona Works for the purpose of receiving, distributing, packing and forwarding the ballots by express or registered mail to the general committee. Local committees will see that each employee is given every opportunity to vote and that his ballot is placed in envelope and sealed; the local committee shall also keep a record of the ballots received.

Only the general committee is authorized to open envelopes and count the ballots. Where the force is limited and the local committee cannot be procured, arrangements shall be made to place ballots in the hands of such employees and they shall be properly instructed as to the manner of getting their ballot to the general committee.

The ballot should be completed at the earliest possible date. No one but the general committee is authorized to open, count and tabulate the returns of the ballot, and all parties to the dispute are entitled to be present when any ballots are opened and counted.

When the ballots have been canvassed, the result shall be reported to the Labor Board and the representatives of the carrier and the employees will proceed with the negotiation of rules.

102 *Exhibit No. 5—Certified Copy of Addendum No. 1.*

If either party to this dispute believes that the spirit and intent of this decision is not being complied with, the complaint should be filed with this Board with all supporting data.

By order of

UNITED STATES RAILROAD LABOR BOARD,

R. M. BARTON,

Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

EXHIBIT NO. 5.

UNITED STATES RAILROAD BOARD
5 North Wabash Avenue,
Chicago, Illinois.

April 1, 1922.
Docket No. 404.

I hereby certify that Addendum No. 1 to Decision No. 218, Docket 404, dated August 5th, 1921, Railroad Employes' Department, A. F. of L. (Federated Shop Crafts) vs. Pennsylvania System, hereto attached, is a true copy of the Addendum so entitled rendered by the United States Railroad Board.

L. M. PARKER,
Secretary, U. S. Railroad Labor Board.

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL.
(Seal) My commission expires August 28th, 1924.

I, R. M. Barton, Chairman of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent is the Secretary of the United States Railroad Labor Board.

R. M. BARTON.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL.
(Seal) My commission expires August 28th, 1924.

EXHIBIT No. 5.

A true copy—L. M. Parker, Sec. U. S. R. R. Labor Board.

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois

August 5, 1921

Addendum No. 1 to Decision No. 218 (Docket 404)

Decision No. 218 (Docket 404)—Railway Employees' Department, A. F. of L., Federated Shop Crafts) vs. Pennsylvania System.

Entry—Modifying Decision No. 218 to the extent that the method of election of representatives of employees shall be by secret ballot.

In Decision No. 218, the Railroad Labor Board, in ordering an election on the Pennsylvania System, for the selection of representatives of the class of employees involved, to confer with the carrier on rules and working conditions, directed that each employee voting should show on his ballot his name, craft, place of employment and whether working or furloughed, and should then seal and forward the ballot to the proper committee.

The purpose of this provision was to make it easy to check up the voters and eliminate any ballots cast by those not eligible to vote, this being the established method of taking a ballot among the railway labor organizations.

The attention of the Board has since been called to the fact that this method of balloting in this instance would be objectionable, because there is such conflict of interest as renders a secret ballot desirable.

The Labor Board therefore orders that said Decision No. 218 be modified to the extent that the representatives of the carrier and the employees, in their conference which the Board has directed to be held on or before August 10, 1921,

be authorized to make such changes in said plan of election as are necessary to preserve the absolute secrecy of the ballot.

By order of

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON,
Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

No V

EXHIBIT NO. 6.

UNITED STATES RAILROAD LABOR BOARD
5 North Wabash Avenue,
Chicago, Illinois.

April 1, 1922.
Docket 404.

I hereby certify that Order In Re: Docket 404, dated September 16, 1921, relating to Petition of the Pennsylvania System Requesting the Labor Board to Vavate and Set Aside Decision No. 218, entitled: Railroad Employes' Department, A. F. of L. (Federated Shop Crafts) versus The Pennsylvania System, hereto attached, is a true copy of the Order so entitled rendered by the United States Railroad Labor Board.

L. M. PARKER
Secretary, U. S. Railroad Labor Board.

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

Seal

GERTRUDE M. DILL.

My commission expires August 28th, 1924.

I, R. M. Barton, Chairman of the United States Railroad Labor Board, hereby certify that L. M. Parker, the above-named deponent, is the Secretary of the United States Railroad Labor Board.

R. M. BARTON
Chairman, U. S. Railroad Labor Board.

Then personally appeared before me the above-named R. M. Barton and made oath to the truth of the statement by him subscribed.

Seal.

GERTRUDE M. DILL.

My commission expires August 28th, 1924.

EXHIBIT NO. 6.

A true copy L. M. Parker, Sec. U. S. R. R. Labor Board

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois
September 16, 1921

Order In Re: Docket 404.

Order Relating to Petition of the Pennsylvania
System Requesting the Labor Board to Vacate
and Set Aside Decision No. 218

Entitled:

Railway Employees' Department, A. F. of L.
(Federated Shop Crafts)

vs.

Pennsylvania System.

Chicago, Illinois:
Post Office Printing Office
9-23-21-30M

No. VI

UNITED STATES RAILROAD LABOR BOARD

R. M. Barton, Chairman.
Ben W. Hooper, Vice-Chairman.
Horace Baker.
J. H. Elliott.
G. W. W. Hanger.
Samuel Higgins.
W. L. McMenimen.
Albert Phillips.
A. O. Wharton.
C. P. Carrithers, Secretary.

60

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois

September 16, 1921

Order In Re: Docket 404.

Order Relating to Petition of the Pennsylvania System Requesting the Labor Board to Vacate and Set Aside Decision No. 218

Entitled:

Railway Employees' Department, A. F. of L.
(Federated Shop Crafts)

vs.

Pennsylvania System.

Nature of the Proceeding.

This case is before the Labor Board on a written application filed by the Pennsylvania Railroad in behalf of itself and its subsidiary and affiliated lines, known as the Pennsylvania System.

In this application two principal questions are raised: (1) The action of the Board in extending the national agreements is attacked; and (2) the Board is asked to vacate and set aside its decision rendered in this cause as of July 26, 1921, No. 218, and to decide and declare certain propositions in accordance with the carrier's contentions as hereinafter set out.

Extension of the National Agreements.

While the question of the extension of the national agreements is not dealt with in Decision No. 218, and no relief is asked by petitioner in connection with said matter, the statement of petitioner's objections to the Labor Board's action therein makes it appropriate for the Board to restate the facts and reasons upon which the Board's action was based.

In order that the matter may be understood by the public and those interested without recourse to matter heretofore fully explained and set out in previous decisions, a somewhat full recital is necessary.

The obvious and declared purpose of Congress in adopting the labor section and title of the Transportation Act, 1920, was to preserve, protect and promote uninterrupted traffic and transportation, and to avoid any interruption to the operation of any carrier growing out of disputes between the carrier and its employees and subordinate officials. It faced and knew the history of the country, knew such interruptions had repeatedly occurred growing out of such disputes, and it knew that even more general and disastrous interruptions then threatened. It undertook to establish a tribunal or tribunals to settle such disputes, to indicate means and methods of settlement, and, if possible, to prohibit and prevent such interruptions. It created the Railroad Labor Board and directed the method by which such disputes should be settled, and how and when they might be brought before the Board.

By mandatory and express language in Section 301 of the Transportation Act, Congress declared it to be the duty of "all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means (strong and all-embracing language) to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof."

It declared and directed that all such disputes should be considered and if possible decided in conference between representatives, designated and authorized so to confer by the carriers or the employees or subordinate officials directly interested in the dispute. It is positively provided that "if any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute." Language could not be made more clear and mandatory.

In Section 307 it is made the positive duty of the Labor Board, on the application of the chief executive of any carrier or organization of employees or subordinate officials, or upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested, to receive for hearing and with due diligence decide all such

disputes not decided as provided for in Section 301, that is, by a conference between the representatives of the parties.

To restate then, it is plain that Congress intended to demand and require that if possible there should be no interruption of traffic by reason of these disputes between carriers and their employees; that it should be the positive duty of the parties interested to confer through their representatives and settle such disputes if possible, but it did not stop there. It directed that if they could not be or were not thus settled, then the parties should refer them to the proper board for decision. If not thus settled, either because a conference was held and they did not agree or because one of the parties refused to enter such a conference, then either party could bring it before the Labor Board, and it was made 61 the positive duty of this Board to receive for hearing and to decide any such dispute which had not been so decided or settled.

Under this law and under conditions more fully recited in Decisions Nos. 2 and 119, the disputes involved in Dockets 1, 2 and 3 were brought before the Labor Board. To that case the Pennsylvania Railroad and its subsidiary and affiliated lines were parties, and they appeared and were heard through their selected representatives from time to time, and at such lengths as they desired. At the opening of the hearings on that case, the representatives of the carriers took the position that only the question of wage increases should be passed on, and that that question only was before the Board, because on that alone had the proper conferences been held and the Board was informed that the carriers had given notice—

"That the matter of continuing national agreements, interpretations thereof and general orders and all other arrangements negotiated between the United States Railroad Administration and the so-called standard recognized labor organizations shall be handled by negotiation between the management and employees of each individual railway." (Dn. 119, p. 2.)

It was further stated that "this recommendation" had been conveyed to all the member roads of the Association of Railway Executives.

Accordingly, the organizations arranged for the presentation, about May 1, 1920, to each carrier of a request for the continuance of the national agreements, et cetera. Such requests were thereafter made on each carrier. Conferences on the requests were denied by the officers of the carriers in gen-

eral on the ground that the matter had been referred to the Labor Board for decision.

Evidences of such requests made to various carriers and their refusals were filed with the Board, including requests to the Pennsylvania Railroad and its subsidiary and affiliated lines. Whether the proper efforts were made by the representatives of the employees to have these conferences is now immaterial in view of the subsequent events. At any rate, applications were filed by representatives of the employees bringing the dispute before the Board.

For reasons fully set out in Decisions Nos. 2 and 119, the Board in Decision No. 2 decided only the dispute as to wages then before it, and reserved for further hearing, action and decision all questions relating to rules and working conditions, and the adoption, extension and perpetuation of the national agreements, rules and working conditions in force under the authority of the United States Railroad Administration, and, pending such further consideration and ultimate decision, the Board continued the national agreements, rules, *et cetera*, in force as a *modus vivendi*. This decision was accepted, acquiesced in, and acted under, so far as we are informed, by practically all the parties before the Board.

Such a decision was obviously necessary because the Board had not had time to hear, and the parties had not had opportunity to present their evidence and views on these questions, and of necessity there had to be known rules under which the men could work and the increases provided for in Decision No. 2 be applied.

But the dispute as to the adoption and continuance of the national agreements was before the Board on the applications filed and certifications made by the representatives of the employees for an adoption or continuation of the national agreements. The Board could not render its final decision for the reasons stated at the time Decision No. 2 was rendered, and, as they were the rules and working conditions then in force, obviously they could not be well terminated without a decision or bringing on an industrial war which Congress had sought to prohibit. After some delay, not the fault of the Board, a date for the further hearing on this dispute was set for January 10, 1921, and all the parties interested were further heard at great length.

On behalf of the executives, including the Pennsylvania System, there was submitted much evidence and argument intended and tending to show that the national agreements,

orders, et cetera, were unfair, unjust and unduly burdensome.

On January 31st the chairman of the Labor Committee of the Association of Railway Executives, a vice president of the Pennsylvania System, appeared before the Board and urged that it at once take action, and, among other things, decide and declare the national agreements, et cetera, terminated; that the question of reasonable rules and working conditions be remanded to negotiations between each carrier and its own employees; and that, as a basis for negotiations, the agreements, rules and working conditions in effect as of December 31, 1917, be reestablished.

Here was a clear recognition—if any were needed—that the Board had jurisdiction and was dealing with the subject of rules and working conditions, and the Board was requested by the representatives of the carriers, including the Pennsylvania System, to put in force rules existing prior to December 31, 1917, as a basis for negotiation, from which it appears that the carriers also realized there must be some authorized set of rules in existence and in force to govern the parties until new rules could be adopted, either by agreement or a decision of the Board.

On February 9, 1921, the Labor Board made an announcement declining to grant the requests made at that time and continuing the further hearing.

After a further hearing the Board on April 14, 1921, rendered and issued its Decision No. 119.

It decided in accordance with the contention of the representatives of the carriers that the dispute should be referred for further conferences and negotiations between the separate and several carriers and the representatives of the employees. The Board denied the contention of the representatives of employees for an indefinite extension of the national agreements, orders, et cetera of the Railroad Administration, and refused to decide, as had been requested by representatives of the employees, that those rules were just and reasonable. It decided that it was not advisable to terminate at once its direction contained in Decision No. 2 for

62 a temporary continuance of the national agreements, rules, et cetera, as it said such a course would leave many carriers and their employees without any rules regulating working conditions, and that if the Board should keep the directions in Decision No. 2 in effect until the agreements should be arrived at, it was possible that agreements might

never be reached. It therefore decided that the direction of the Board in Decision No. 2, extending the rules and working conditions and agreements in force under the authority of the United States Railroad Administration, should cease and terminate July 1, 1921; that in the meantime the representatives of the carriers and of the employees should confer, beginning the conferences at the earliest possible date, and endeavor to decide as much of the dispute between them as possible. It further directed that the conferees should keep the Board informed of the final agreements and disagreements to the end that the Board might know prior to July 1, 1921, what portion of the dispute had been decided. It reserved the right, under certain conditions to terminate its direction as to the extension of the national agreements, rules and working conditions, beyond that date. It announced that it would promulgate such rules as it determined just and reasonable as soon after July 1st as was reasonably possible, and make them effective as of July 1, 1921.

The Board was then assuming that all the parties would in good faith endeavor to meet and confer as the Board had directed, and as the Transportation Act enacted by Congress required. It assumed that this would be done promptly, and the matters of difference submitted to the Board. The Board retained jurisdiction of the whole matter and proceeded with the hearings, and further evidence and arguments were submitted by all the parties to the dispute.

On June 27, 1921, the Board finding that in some instances the carriers and employees parties to the dispute had reached an agreement on rules, but in a considerable number of instances there remained certain rules upon which no agreement had been reached, while in others conferences had not yet begun, deemed it necessary to make a further order, and did on that date (June 27th) issue Addendum No. 2 to Decision 119 in which it directed among other things that, in lieu of any other rules not agreed to in conferences held, the rules established by or under authority of the United States Railroad Administration should be continued in effect until such time as rules were considered and decided upon by the Labor Board.

It was the judgment of the Board that this was proper and necessary, especially in view of the fact that in many instances, on account of disagreement of the parties as to how and with whom such conferences should be held, no such conferences had been held as the statute required and as the

Board had directed. It was thought necessary in the interest of industrial peace that the Board should make this extension and give the parties additional time in which to comply with the orders of the Board and provisions of the statute.

Among other carriers which had not held conferences directed by the Board and which had failed to report the negotiations, agreements and disagreements, was the Pennsylvania Railroad and its system of affiliated carriers. Disputes in regular form had been filed with and submitted to the Board on behalf of the Railway Employees' Department, A. F. of L., Federated Shop Crafts, against the Pennsylvania System, and also against the same road by the Brotherhood of Railway and Steamship Clerks, Freight Handlers, Express and Station Employes. It was in the dispute filed by the Railway Employees' Department, A. F. of L., resulting in Decision No. 218, that complaint was made. On behalf of complainants in that case it was claimed in substance, that they represented the majority of the shop crafts and had the right under the Transportation Act and the decision of the Board to a conference and to negotiate a contract for the classes of men they represented on that railroad and its affiliated lines.

In this connection it should be further stated that even prior to the Federal administration, various carriers had in some instances entered into written agreements or contracts duly signed which were negotiated with labor organizations representing employees in which rules were adopted and conditions prescribed that were to govern special class or classes covered by the contracts. In other instances negotiations were held and agreements reached which were not formally signed, but which were promulgated by the management to govern the employees, but which were none the less contracts. In still other instances, rules were verbally negotiated and adopted by practice.

During the Federal administration the national agreements were negotiated, entered into and signed by the Director General and certain labor organizations representing certain classes of employees. On many roads there were employees who did not belong to labor organizations. On some roads there were separate and distinct organizations between which there were conflicting claims and questions of jurisdiction. That is, some of the employees in a certain class were found to be members of one organization, while some of the same class of employees would belong to another and distinct

organization, which separate organizations did not cooperate or affiliate but had open and frequent conflicts and contentions. Some of these disputes had been brought before the Board. It was obvious that the nature and necessity of the matter required on any particular road, at least on any division, that the rules and working conditions governing a particular class—as for instance, section men—should be uniform. One set of rules could of course not be prescribed for the members of one organization, and another and different set for the members of another organization. In other words, two different sets of rules and working conditions could not well be negotiated and applied to the same class or classes of employees on the same road or division.

63 Principles Promulgated in Decision No. 119.

In order to facilitate the conference, promote early agreements, and expedite as early a settlement of these matters as possible, the Labor Board adopted as a part of Decision No. 119 certain principles and regulations which it directed should govern the parties in these negotiations—among others, principle 15, which reads:

“The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice.”

The Transportation Act, 1920, had plainly and expressly recognized these labor unions and organizations as representatives of the employees which were to be dealt with by the carriers and the Board. The Act made no distinction as between organizations; hence, the Board could make none and does make none. But it had to recognize the rights of each separate class as the “parties directly interested,” as under the Act the employees directly interested had the right to select their own representatives. This could only be secured by the voice of the majority of that class.

It must therefore be obvious that the principle adopted was in pursuance of the directions and spirit of the Act, and was fair, just, reasonable and necessary.

Directions in Decision No. 218.

The Pennsylvania Railroad System Federation No. 90 of the Railway Employees' Department, A. F. of L., in petition to the Labor Board claimed that it represented a majority of the shop crafts on the Pennsylvania System and had the right under the orders of the Board and the Transportation Act to represent the employees and to conduct and conclude the negotiations as to rules affecting them, and that this right had been denied and was refused them by the management. It was to assert and, through the decision of the Board, procure this right that the dispute which was decided in Decision No. 218 was brought before the Board. Both sides were granted a full hearing.

It appeared that both parties, to an extent recognized the requirements of the Transportation Act and the rules adopted by the Board to carry out that Act. It was recognized by both that it was proper or necessary to ascertain by a vote of the employees who were or should be the representatives "designated and authorized" to conduct the conferences and negotiations.

The parties in conference failed to agree on a method and each adopted a plan and held a separate election of its own. Each side reported a different result and made conflicting claims and charges. This was the dispute decided by the Board in its Decision No. 218.

The Board, in substance, held that both sides were to some extent in error and that neither election was entirely fair and legal. The Board directed another election to be held under a plan and rules adopted and promulgated by the Board. It subsequently came to the attention of the Board that objection was made to the method of holding the election, because it provided for a ballot that was not secret. The Board immediately, on its own initiative, issued Addendum No. 1 to said decision, authorizing the parties to provide a secret ballot.

The Board desired to give the parties greater liberty, believing, if good faith were observed by all, that there should be no real difficulty in securing an honest and fair election, and thus ascertaining the real wishes of the employees.

In Decision No. 218, bearing date of July 26, 1921, it was directed that a conference of the carrier and the representatives of the class of employees concerned, organized and un-

organized, be held on or before August 10, 1921, to complete arrangements for said election. On August 10th, the last day of this period, the carrier asked for a fifteen-day extension thereof. This request was promptly granted by the Board. The time having been fixed in the first place to enable both parties to hold said conference and arrange for said election, the extension of time was granted for the same purpose. It appears, however, that the time so granted has not been used for the purpose intended, that the conference directed has not been held, and that no steps have been taken to enable the employees to select their representatives as required by the law and ordered by the Board. On the contrary, the entire thirty days have been consumed by the carrier in the active promulgation of propoganda, at an enormous expense to its stockholders, in which the issues involved in this controversy have been misstated and the action and position of the Railroad Labor Board grossly misrepresented.

As the end of the thirty days granted by the Board approached, the carrier filed its application to the Board to vacate and set aside Decision No. 218. In this application the carrier says, in effect, and in its outside propoganda in express words, that it will not abide by the decision of the Board in this matter, unless said decision sets the seal of its approval on the carrier's conduct.

The open attacks of the carrier on the Labor Board and on the law which created it, shall, in no wise, affect the Board in its effort to give calm and just consideration to the carrier's petition, because matters of great moment to the public and to the carriers are involved.

It may be as well to state in this connection, once for all, that the Railroad Labor Board cannot be swerved from what it considers a just and legal course by the hostile printed propoganda of dissatisfied carriers or by the continued threats of labor strikes that are made before it.

64 The Transportation Act is regarded by thoughtful men as the greatest forward step that has ever been taken in any country to preserve industrial peace. The plain, primary purpose of Congresss was to protect the public from the financial disaster, physical suffering and general demoralization that would result from the interruption of railroad traffic and transportation. Secondarily, the Act was intended to save both labor and capital from such calamities.

That the time has come when the complex industrial and

social system of this great and populous country must be guaranteed all the immunity possible from traffic and transportation disturbances, is beyond all question. If the Transportation Act does not provide such a guaranty, the public will find means, legal and constitutional, that will.

The Labor Board has been gratified by the co-operation it has received, as a rule, from both carriers and employees in its difficult task of aiding the transition of the country's great transportation systems from a war basis to one of peace, with the least possible conflict.

The Board, however, recognizes the right of any party to a controversy before it to take such legal measures as it may deem desirable to protect itself from any injustice that might be imposed by the action of the Board.

The statement of the proceedings above set out, all of which is beyond question, fully shows that a dispute to which this carrier was a formal party and in which it appeared and was heard at length was properly before the Board.

Points in Petitioner's Application.

The grounds set out in the petition for the vacation of Decision No. 218 will now be considered *seriatim*.

1—The protest of the carrier against the extension of the national agreements.

This point has hereinbefore been disposed of.

2—The right of the Board to adopt the principles set out in Decision No. 119 and in other decisions, for the guidance of carriers and employees, is questioned.

It is a settled principle of law that under a remedial act, as this is, even where not expressly given, sufficient powers are implied to enable the purposes of the Act to be accomplished. But in this instance the power is expressly given in the language of the statute—namely, "The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title."

In the adoption of the rules promulgated in these several decisions, the Board was making "regulations necessary for the efficient execution of the functions vested in it"—regulations to accomplish the purposes of the Act, to promote and make practicable, if possible, the proper conferences provided for in the Act, and to establish regulations and conditions that would lead to a settlement of disputes and prevent the interruption of traffic.

The Transportation Act makes it the duty of the Board to establish fair and reasonable rules and working conditions. In its Decision No. 119, directing the parties to confer and negotiate rules and working conditions, in order to indicate some principles by which the Board would be governed in the settlement of disputes and in order to thus facilitate agreements and induce more prompt settlements, the Board set out and adopted certain principles that should govern, and which it indicated would be the basis of its decision and action. As an example, it provided among other principles the following: "3. The management having the responsibility for the safe, efficient and economical operation, the rules will not be subversive of necessary discipline," and "13. The health and safety of employees should be reasonably protected.

If the Board is compelled, as it is by the Transportation Act to decide what are just, fair and reasonable rules and working conditions, certainly it was within its power to indicate to the parties some of the principles which should govern.

It is not claimed by petitioner that any of the principles set out in Decision No. 119 for the guidance of carriers and employees in negotiation of rules has worked any injury to petitioner, nor does petitioner disclose any connection whatever between its criticism of these principles and the matters at issue in the pending dispute.

3—An attack or criticism is made on the statement in the decision that "there is no question of the closed or open shop involved in this dispute and no other real matter of principle. The question involved is merely one of procedure."

As will be observed, this statement was made in reply to the contention of the carrier that previous action of the Board tended to establish the closed shop.

In the application before the Board, it is said with much emphasis that the carrier takes direct issue with the Board on this subject. The carrier avers that the Board has no power or right to set up its judgment or opinion against the carrier, that dissatisfaction with mere matters of procedure should not be "tortured into a 'dispute' within the purview of the Act," and that a question of mere procedure could in no sense be a dispute.

In this the petitioner loses sight of the fact that the Transportation Act provides that any and all disputes between the carrier and its employees shall be brought before this Board

for settlement, unless otherwise adjusted. Questions of procedure are not excluded.

It certainly was a very acute dispute, and the position of the carrier practically was that it had the sole right to proceed in its own way in the selection of the delegates who 65 were to represent the employees; that it, and it alone, had the right to prescribe the plans and conduct the proceedings and be the sole judge of the results; and that any judgment, opinion, direction or regulation by the Board was an uncalled for and unauthorized interference with the prerogatives of the carrier. The mere statement of its position would seem to carry its own answer. It must be evident to every one that if this practice should prevail, there would be no real conferences, no liberty of action left to the employees, and that there could be no real negotiation and settlement of matters in dispute.

4—The carrier announced it to be its intention and purpose to follow its own plan to decide upon the qualifications of the employees who were to vote, and avers that it has the right to prescribe and limit the qualifications of employees as to their voting by eliminating those not in actual service at the time, although they may be still on its rolls as employees, but simply laid off or furloughed at the time of election.

This is a question that was not raised at the original hearing and the Board did not have the benefit of the views of either party thereon.

The carrier further denies the power of the Board to prescribe any methods as to the selection of representatives, and questions the correctness of the Board's action in prescribing the rule for ascertaining the representative capacity of the spokesmen of unorganized employees.

This is likewise a matter that was not presented at the original hearing.

The carrier also asserts the right to limit the representatives to be selected by the employees to persons who are in the actual employment of the carrier.

The Transportation Act does not prescribe any such limitation. We know of no law in this country which prevents or limits a man in selecting his own representative, and this Board has certainly no power to prescribe a limitation which the law does not, and has no disposition to do so.

As has been repeatedly pointed out, when the Transportation Act was passed, Congress knew of and obviously had

directly in view the labor conditions existing on the transportation lines and the previous history of labor troubles.

It knew of the labor union and organizations, their history, growth, purposes and nature. It knew that negotiations as to rules and working conditions and as to disputes had in the past been largely conducted on behalf of the employees by these organizations, and that their officials, committees, agents and employees were peculiarly fitted and qualified to conduct these negotiations; that it would be difficult and unsatisfactory for individual employees or even small groups of employees in the face of these conditions to conduct negotiations and settle disputes; and that an attempt to do so and to ignore such organizations and the acquired and vested rights of the members thereof might lead to industrial war. No one can doubt that these matters were known to and considered by Congress, and with these matters before Congress, it is to be noted as most significant that Congress provided only three methods, or only three classes who were authorized to bring disputes before the Board; (a) The chief executive of any carrier; (b) the chief executive of any organization of employees or subordinate officials; and (c) 100 or more unorganized employees.

The organizations are repeatedly and expressly recognized in the Act and shown to have the right to represent the employees in these matters.

Of the hundreds of disputes brought before this Board probably less than five have been brought by and for unorganized employees. It seems useless and even stupid to argue and discuss this phase. But we want to make it plain that Congress contemplated that the organizations would largely represent the employees, and made it the imperative duty of the Board to hear them.

This presents the real crux of the controversy in this case. Here was an organization to which many, if not a majority, of the employees in the shop craft class of this company belonged. It is strongly insisted that a majority of this class on this road desired and had authorized this organization to represent them in the conferences and negotiations to be held. For reasons and motives that are immaterial to this Board, it is evident that the management was not willing, if it could be avoided, that this organization, its officials, agents and committees should represent these men, and it evidently formed its plans to prevent this if it could. Anyway, it was unwilling to agree, or did not agree, with this organization on

a plan to fairly ascertain the wishes of this class of employees on the road. Both of the contending parties adopted and carried out their own separate plans, both of which were held by this Board to be faulty and unfair. The Board endeavored to prescribe a plan and method that would fairly obtain and accurately express the wishes of the majority of the employees of this class. This decision the carrier rejects and refuses to abide by, and arrogates to itself the sole function and power to decide these matters. If a majority of this class of employees on this road has an absolute right under the law to select their own representatives—and this is the clearly expressed will of Congress—this Board in its proceedings and decisions must obey the mandate of Congress. If the carrier refuses, it is an attack not so much on this Board as on Congress. It is nothing more or less than a denial and repudiation of the sovereign will of the United States as expressed by Congress.

66 If the members of any class wish to joint a union they have that right. If they desire to remain out or leave such a union at any time, they have that right. If they or a majority of any class want a union or its officers to represent them, they have that right. If they, whether union men or not, want other individuals to represent them, they have that right. Neither this Board nor the management of the Pennsylvania System has the right by any kind of plan or movement to dictate as to who shall be their representatives. Any attempt to do so is an unauthorized assumption of power.

5—The carrier states in its petition that it has been its policy to establish and maintain employee representation since the termination of Federal control.

The carrier's policy in this regard embraces no element of originality, as employee representation is exactly what the Transportation Act provides. In that the carrier dealt with the four transportation brotherhoods, without cavil or evasion, recognizing their representatives without question or friction, it is entitled to due credit. The same policy pursued with the shop crafts would have wrought the same beneficial results.

6—Section 6 of the petition contains a somewhat vague statement to the effect that the employees' representatives have recently signified their approval of the agreements negotiated with carrier.

If this be true, it is worthy of consideration.

7—The carrier states that the agreements it has entered

into with employees of the shop crafts are in full force and effect, that the parties have acquired mutual rights thereunder, and that their abrogation by this Board will work a great injury to both carrier and employees.

This claim contains no merit. If the carrier, in violation of law, hurriedly entered into alleged agreements with a minority of the shop craft employees, over the protest of a majority, it can not complain at the result of its own actions.

8—The carrier suggests that the employees who are not parties to the alleged contracts and who do not want to be bound by them may invoke the aid of the Board.

The carrier in this suggestion ignores the statutory right of the employees in the first instance to a voice in the making of said agreements.

On the question as to the legal right of the carrier to establish rules and working conditions, the Board refers to its discussion of this subject as contained in Decision No. 224, and adopts as part of this decision the statements therein made and conclusions therein arrived at. We think that opinion demonstrates that it is the duty of the Board to prescribe what are fair, just and reasonable rules and working conditions for the parties without regard to their strict legal rights, and that if each party is allowed to insist upon its strict legal rights, as defined by the decisions of the Supreme Court of the United States prior to the enactment of the Transportation Act, it would be impossible for them to reach agreements, except the agreement to disagree and separate and thus, in effect, demoralize the transportation system of the country.

The purpose of the Transportation Act was to enable the parties to meet in conference, and when unable to compose their differences, for the United States Railroad Labor Board to prescribe conditions under which they should act. It is pointed out in the decision above referred to that there are two possible views as to the present state of the law on this subject: One is that the decisions of this Board are merely persuasive with only a moral obligation resting upon the parties; the other is that Congress in the exercise of paramount police power necessary for the preservation, safety, and progress of the country, has, as to these common carriers and their employees, for the benefit of the public, limited the exercise of their hitherto unquestioned legal rights in such matters. But, as stated in that decision, whatever view may be taken, the duty of the Labor Board remains the same; that is,

to decide what is just, fair and reasonable as between the parties and the public.

Order.

It is the order of the Labor Board that the carrier's request for an oral hearing of its petition shall be granted for the purpose of permitting the carrier to present its views on the following matters:

1—The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed, or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements on rules and working conditions.

2—The question of how the representative capacity of the spokesmen of unorganized employees shall be ascertained.

3—The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class.

Said hearing is set for 10 a. m., Monday, September 26, 1921.

The Board declines to grant a hearing upon the other questions raised in carrier's petition, for reasons hereinbefore set out.

By order of

UNITED STATES RAILROAD LABOR BOARD

R. M. BARTON,
Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

67 And on to-wit: the 3d day of April, 1922, there was filed in the Clerk's office a certain Plaintiff's Exhibit No. 1, in words and figures following to-wit:

A true copy

Attest: L. M. Parker, Secretary U. S. R. R. Labor Board.

UNITED STATES RAILROAD LABOR BOARD

Chicago, Illinois,

September 12, 1921.

Decision No. 224 (Docket 426).

United Brotherhood of Maintenance of Way Employes
and Railway Shop Laborers

vs.

Butler County Railroad Company.

Questions in Dispute.

The matter in dispute is the discharge of Jesse H. Hicks and Frank Mosley, section foremen, from the service of the Butler County Railroad Company. There are two questions involved: 1. Were they unjustly discharged, and are they entitled to be reinstated? 2. Shall they be paid for all time lost while out of the service?

Nature of the Proceeding.

An application to bring before the Labor Board the dispute arising over these discharges was filed by the chief executive and representative of the above-named organization on January 27, 1921, alleging that the discharges were unjust and wrongful, and asking that they be reinstated with full seniority rights and paid for all time lost while held out of the service of the carrier.

In this case no oral hearing was requested by either party; hence, none was held. The case is before the Board on the ex parte statement made by the organization above named, with

accompanying exhibits and the answer of the carrier. The carrier was notified and furnished with copy of the complaint, and its answer and defense is embraced in a letter to the secretary of the Labor Board dated May 20, 1921, in which statements are made of the carrier's position and its version of the facts.

History of the Controversy.

Jesse H. Hicks entered the service of the defendant carrier as a section laborer on February 14, 1909, and was promoted to section foreman on October 17, 1916. Frank Mosley entered the service of the carrier as a section foreman on December 25, 1918. Both men were discharged from the service of the carrier on December 18, 1920.

While there are some general statements of other reasons for the discharge of these men, the Board does not understand that such statements are relied upon, but the company sees proper to place its defense on the fact that these men belonged to the same labor union to which the men under them belonged. And it advances and maintains the broad proposition that this was and is just and sufficient reason for their discharge, and announces that the carrier is pursuing and will pursue this policy which it claims the legal right to do, saying:

"The company has always insisted upon exercising entire freedom of action in selecting its subordinate officials. It does not inquire who among the men belong to labor unions or who do not, but the management feels that the economic interests of the public and of the corporation and, in fact, public safety require for the company the widest freedom of action in the selection of those who are to direct the work of the section men and see that their duties are expeditiously, economically and properly performed, and to attain that result it is entitled to and must have the undivided allegiance of the foremen."

This leaves the Board no discretion but to decide the case on the question so broadly and emphatically presented.

Opinion.

The principle invoked of the legal rights of the management in their dealing with employees has cast some confusion and shadow over every action and decision of the Board.

The Board understands that it is its duty to follow the law, and its membership has been sworn to support and maintain the principles of the Constitution of the United States, which obligation the members will faithfully observe.

The Board is not unaware of the many decisions of the courts, including the Supreme Court of the United States, based on the principles of the Constitution declaring the rights of individuals, including corporations, and some relating directly to railroads, as to the freedom of management and the control of their properties, and the right to prescribe rules and working conditions. We know that the Supreme Court of the United States, in *Hitchman Coal & Coke Co. v. Mitchell, et al.*, 245 U. S. 229, has said:

"This court repeatedly has held that the employer is as free to make non-membership in a union a condition of employment, as the working man is free to join the union, and that this is a part of the constitutional rights of personal liberty and private property, not to be taken away even by legislation, unless through some proper exercise of the paramount police power."

The Supreme Court of the United States has upheld and vindicated such action as a legal right with which the courts would not interfere. It has been held that the public is in no sense the business manager of such carriers. Of all this the Board is fully aware and has no disposition to question in any way the soundness or justice of these decisions. But it is bound to assume that these principles and these decisions were equally well known to and recognized by Congress when it passed the Transportation Act, 1920, and that there was no disposition on the part of Congress to evade or infringe upon them.

69 It is the duty of the Labor Board to construe and apply the provisions of the Transportation Act on this assumption and in view of these decisions.

The Board has clearly before it as a settled well-defined law that a laboring man has the right to belong to a union, and equally clear that a carrier has the right to refuse to employ a laboring man who does belong to a union. For this Board to hold that the discharge of these men for the reason that they do belong to a union was wrongful might at first glance appear to be either a willful or an ignorant disregard of the carrier's constitutional right as declared by the Supreme Court of the United States, but the Board does not so understand the matter.

As stated, Congress, when the Transportation Act was passed, was fully informed of the constitutional and legal rights of all the parties and interests to be affected. It must be assumed to have had these rights in mind and legislated accordingly. Among the conditions confronting Congress were these: (1) The great transportation systems of the country being conducted and maintained by many carriers all under private ownership and control; (2) the employment by these carriers of vast numbers of employees more or less especially experienced and trained and fitted for this business, who had generally made this service a life occupation and who were largely dependent on it for their continued existence and welfare. These transportation systems more vitally affected all classes of people and every line of business and endeavor than any other agency of our civilization and life. In fact, the general progress and, indeed, the well-being and almost the existence of most of our people are vitally dependent on the continued and proper functioning of these transportation systems. Anything seriously interrupting or interfering with these systems of transportation and traffic could only and would necessarily result in tremendous financial loss and untold human suffering. Capital, labor, civilization, are dependent on them. The employees in the service of these corporations who, as we say, were largely dependent on them for continuous employment and welfare had, to a great extent, in the protection and upbuilding of their interests, as they had a right to do, joined various unions or organizations, just as the holders and managers of large combinations of capital had done.

These organizations and managerial groups were called upon to deal with each other. From the very nature of things there were conflicts of interests and differing views in regard to the matters of their several interests and rights. Frequent conflicts had in the past arisen, and at the time of the passage of the Transportation Act more serious and general conflicts were threatening, growing to some extent out of post-war conditions. It was apparent that if these were not prevented the most serious and lamentable results would follow.

It was and is intolerable from a public point of view that strikes or lockouts of any serious character, especially those of a general nature with far-reaching and disastrous effect, should occur. Without regard as to which party is primarily to blame, the effect is the same and the helpless and innocent public is the principal sufferer. These transportation inter-

ests from their very nature and from governmental grants acquire great and special privileges and are affected with a public use and owe a public duty. This duty is imposed both on the management and the employees. The public pays the bill and on the public both sides are dependent for their existence. Moved by these conditions and considerations, Congress passed the Transportation Act of 1920, created the United States Railroad Labor Board, and prescribed in a general way its functions; the clear purpose being to provide an impartial tribunal, which, looking to justness, equity and fair dealing between the carriers and their employees and the greater and dominating interests of the public, would be able to settle all conflicts and disputes and prevent any interruption of traffic. Congress declared it to be the legal duty—as before it was certainly a moral duty—of "all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof."

The Transportation Act provides that all such disputes shall be settled in conference if possible by representatives selected by the parties directly interested. If they can not agree, the Act provides for bringing the dispute before the United States Railroad Labor Board. The duty is imposed on the Board of deciding disputes as to wages or working conditions on the basis of establishing such as are in the opinion of the Board just and reasonable—not according to the strict legal rights in all instances of either party, for one party might have a legal right to prescribe a wage for which the other party would have a legal right to refuse to work; or, the carrier might have a legal right to impose a rule or working condition under which the employees would have a legal right to decline to serve.

The public interests demand continuous and uninterrupted operation of the transportation lines; hence, the Labor Board is to settle this dispute on terms which in its opinion are just and reasonable.

It was certainly the hope of Congress that both classes, the employers and the employees, would loyally accept such decisions, and thus attain the purpose for which the Act was passed. There are two possible views to be taken of the legal effect and proper construction of the Transportation Act: One is that Congress has impliedly if not directly invoked,

exercised and put in effect by its legislation that "paramount police power" referred to in the decisions of the Supreme Court of the United States by which the hitherto unquestioned legal rights of the employers to prescribe conditions of employment might be limited and controlled for the paramount public interest; that the judgment of the Labor Board as to what are reasonable wages and just and fair and reasonable rules and working conditions is to be substituted for the 70 conflicting judgment and opinions of the carriers and their employees, and that therefore the decisions of this Board under the Act may be made legally effective by orders of a court with proper jurisdiction. The other is that the decisions of the Board are only persuasive and will only have such effect as both parties are willing to concede, or as public opinion may by moral pressure enforce.

In support of the latter view is the significant fact that Congress gave the Board itself no power to issue writs or in any way makes its decisions effective, but only provided that it might determine after a hearing whether its decisions had been violated and make such decisions public in such manner as it may determine. And it is a plausible view that Congress had directly in mind the decision of the Supreme Court as to the rights of managements to prescribe conditions of employment and either doubted its own limitations or hesitated as to the extent to which the paramount police power should be invoked or exercised under the conditions existing.

In support of the other view are the purposes to be attained, the vast and vital interests of the public so seriously threatened, and the strong and mandatory language of Sec. 301 of the Transportation Act requiring "all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof," compelling them to settle same by conference if possible, and when that can not be done to submit the dispute for the decision of the boards provided for by the Act.

It is plausible to assume that it was the purpose of Congress to provide means as effective as possible to prevent an interruption of traffic growing out of such disputes. As to which view is correct, it is not for this Board to determine; that must be left to the courts or further action of Congress,

if in its opinion further legislation is needed to make the Act more effective.

But without regard to which view of the purpose and effect of this legislation is correct, the Board is of the opinion that its duty regarding these questions remains the same; that is, it should decide these disputes on the basis prescribed by Congress as to what is, under all the circumstances, just and reasonable to the parties directly interested and to the public.

It must be evident to all and beyond doubt or controversy, from the very nature of things and the character of the disputes that cause the friction between carriers and their employees which lead to interruption of traffic, that Congress did not intend or expect to limit the Labor Board to deciding these disputes according to the strict legal rights of the parties, because if it did, and both parties relied strictly and fully on their legal rights, the disputes never could be solved. If the carrier has, as contended, unlimited freedom in establishing rules and working conditions and is going to do so regardless of this Board's opinion and decision as to what is just and reasonable, there can be no practicable use or sensible reason for the Board hearing the dispute and expressing an opinion or rendering a decision. Likewise, if the employees are going to ignore the Board's opinion and decision and rely on their legal rights to determine for themselves the rules under which they will work, as some of them have been indicating they will do, it is equally useless for the Board to hear and decide the matter. It was doubtless because of a recognition of this conflict in strictly legal rights that Congress, in the interests of the public and to prevent interruption of traffic and the operation of the carriers, created this Board and directed it to decide what, in view of all the facts, was and is just and reasonable in each case.

The Board in its previous decisions has endeavored to be governed by these principles. It has constantly in view the public interest and the rights of the public to demand prompt, efficient, and economical transportation. It recognizes the necessity for discipline and control by management, and it hesitates to interfere by its decision with the management's freedom and discretion in these matters. It has required a clear showing of obvious wrong or a plain violation of contract of employment before granting relief, as its numerous decisions in discipline cases demonstrate. But it must and does recognize that employees have interests that must be

given consideration if disturbance is to be avoided and loyal, cheerful, and efficient service obtained.

Coming more directly to the question involved in this particular case—the justness and reasonableness of a rule of conduct or policy by management to discharge a man simply because of his membership in a union. The carrier has seen proper to make the issue in this case that, and that alone. It is so made in the answer of the carrier.

Besides that, the vice-president and general manager, W. N. Barron, wrote the following, which is made an exhibit to the application:

“December 23, 1920.
File 3534

“To Whom It May Concern:

Jesse Hicks has worked for this railroad for a number of years, first as section laborer and later as section foreman in charge of one of its track sections. He is competent, industrious, and his services were satisfactory. He was discharged because he belonged to a union of track men to which the men he was working also belonged. The membership of his men and himself in that union was deemed incompatible with his position as foremen representing the company in its relations with the men, and for that reason was retired.

Respectfully,

(Signed) W. N. BARRON,
Vice President and General Manager.”

Here then we have a man declared by the management to be competent and industrious, and whose “services were satisfactory,” discharged for the reasons stated, and the company announces this as a policy it proposes to follow. Is this just and reasonable?

The unions have existed for many years. Many among all classes of railroad employees have joined them for the 71 upbuilding, preservation, and protection of their interests. They have acquired very valuable rights through and under them—interest of insurance, rights of seniority, methods and means of presentation and settlement of their disputes between each other and the carriers, etc. They have spent hundreds of thousands of dollars in engaging and training experts, and in gathering, compiling and amassing pertinent statistical data and facts useful alike to themselves, the carriers, and the public. These organizations are lawful. They are permitted and recognized in the Transportation Act which created the Labor Board, and the law makes it the duty

of the Board to receive and decide disputes presented by such organizations. The law also makes it the duty of the carriers to confer with these organizations. Now, looking to the interests of the public in uninterrupted traffic and of these employees who were within their recognized rights in joining such unions, is such a rule fair and reasonable, or does a membership in a union present a just and reasonable ground for discharge from employment when otherwise the employee's services were satisfactory?

In view of all these facts and the purpose, spirit, and provisions of the Transportation Act, 1920, the Labor Board does not think so.

As to the application for reinstatement, the Board is of the opinion that as the discharge of these men was wrongful and not in accord with the spirit and purposes of the Transportation Act, but contrary thereto, these employees should be reinstated with such seniority rights as they had, if any. They should be reimbursed for time lost, less the amount they have since earned, provided there was in effect on the carrier lines, a rule or established usage which guaranteed to employees pay for loss occasioned by unjust suspension or dismissal.

The individual importance of this particular case is small, but the principle involved is momentous, and the Board has felt that in the public interest its position should be made clear and its views and reasons set out so they could be understood. It has found reasons for this in the very emphatic position taken by the carrier in this case, indicating a purpose to carry out its policy with unlimited freedom, possibly without regard to the decisions of the Board, and recent happenings in other cases where a disregard of the decisions of the Board has been indicated by announcements from both carriers and employees.

It is to be hoped that the effect of this decision will not be misrepresented or misunderstood. Much propaganda has been published and circulated which purposely or ignorantly misrepresent the purpose and effect of the decisions of this Board to the effect that the tendency, if not the purpose of its decisions, is to establish a unionized closed shop. Such statements have no foundation in fact. No such proposition has been submitted and no action taken by this Board tending to establish such conditions.

If Congress should enact a law prohibiting recognition of labor organizations of railway employees, or authorizing carriers to establish rules in the interest of the public prohibit-

ing railroad employees from belonging to such unions, this Board would obey the law. But on the contrary, Congress has recognized as lawful and directed this Board to recognize them in the railway service, and this Board in this decision is only obeying the obvious direction of Congress. Its decisions on this subject do not tend to a closed shop and have no bearing whatever on the very bitterly debated question of the open and closed shops in other industries. Any representations or statements to the contrary are not only misleading, but can only work public harm.

This Board can only to the best of its ability decide the disputes brought before it according to the provisions, purposes and spirit of the Transportation Act, seeking to do all it reasonably can to secure industrial peace along these lines and to prevent an interruption of traffic so disastrous to public interests. If either party to such disputes sees proper to disregard its decisions and thus contribute to or cause the public misfortune which Congress sought to prevent, the responsibility is with those guilty of such action.

While the Board regrets such action, not so much because it is an attack more or less direct on the power and effectiveness of the Board, but because it, in the opinion of the Board, is in effect a deliberate attempt to ignore the power and defeat the will and purpose of Congress plainly expressed, and Congress in these matters represents the dignity, power and sovereignty of the United States. The remedy lies with the public, or possibly with Congress or the courts.

Decision.

Holding these views, the Labor Board, in this case and for the reasons indicated, decides that the action of the carrier in discharging Jesse H. Hicks and Frank Mosley for the causes named was unfair, unjust and unreasonable and they shall in justice be reinstated, and placed in full enjoyment of such seniority rights, if any, as the rules or practices existing on the carrier in question guarantee, provided they report for assignment within fifteen (15) days from date of this decision. They should be reimbursed for losses suffered, less the amount earned since date of dismissal, provided there was on this carrier an existing rule or established usage guaranteeing to employees pay for loss occasioned by unjust suspension or dismissal. These men will furnish the carrier within fifteen (15) days complete statements of their em-

ployments since their discharge till time of reinstatement, including a statement of total amount severally earned by them.

By order of

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON,
Chairman.

Attest:

C. P. CARRITHERS,
Secretary.

Chicago, Illinois:

Post Office Printing Office
9-13-21-30m

72 UNITED STATES RAILROAD LABOR BOARD
5 North Wabash Avenue
Chicago, Illinois

R. M. Barton, Chairman

Horace Baker

J. H. Elliott

G. W. W. Hanger

Samuel Higgins

Ben W. Hooper

W. L. McMenimen

Albert Phillips

A. O. Wharton

—
L. M. Parker, Secretary

April 3, 1922.

I hereby certify that Decision No. 224, Docket 426, dated September 12th, 1921, United Brotherhood of Maintenance of Way Employes and Railway Shop Laborers vs. Butler County Railroad Company, hereto attached, is a true copy of the Decision so entitled rendered by the United States Railroad Labor Board.

L M PARKER
Secretary, U. S. R. R. Labor Board.

Then personally appeared before me the above-named L. M. Parker and made oath to the truth of the statement by him subscribed.

GERTRUDE M. DILL
Notary Public.

(Seal)

My commission expires August 28th, 1924.

(Endorsed) 2516 Pltff's Exhibit No. 1, Filed Apr 3 1922
at o'clock M. John H. R. Jamar Clerk

pr. 3. 73 And on, to wit, the 3d day of April, 1922, came the defendants by their counsel and filed in the Clerk's office of said Court a certain Motion to Dissolve, in words and figures following, to wit:

74 UNITED STATES DISTRICT COURT,
Northern District of Illinois,
Eastern Division.

In the District Court Thereof. } ss.
April Term, A. D. 1922.

The Pennsylvania Railroad Company
v.
United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, Arthur O. Whar-
ton, Walter L. McMenimun, Horace
Baker, John H. Elliott, Albert Phil-
lips and Samuel Higgins.

MOTION TO DISSOLVE.

By their counsel the defendants move to dissolve the temporary restraining order heretofore issued.

BLACKBURN ESTERLINE

*Special Assistant to the Attorney
General.*

CHARLES F. CLYNE

United States Attorney.

EDWIN L. WEISL

WIN E. WEASE Assistant United States Attorney.

(Endorsed) Filed Apr 3, 1922. John H. R. Jamar, Clerk

75 (Endorsed) No. 2516 In the District Court of the
United States for the Northern District of Illinois East-
ern Division The Pennsylvania Railroad Company vs.
United States Railroad Labor Board, R. M. Barton, G. W. W.
Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. Mc-
Menimin, Horace Baker, John H. Elliott, Albert Phillips and
Samuel Higgins. Notice to Dissolve Charles F. Clyne U. S.
Attorney

76 And on to-wit: the 4th day of May, 1922, there was filed ^{Filed} ₁₉₂₂ in the Clerk's office of said Court a certain Opinion, in words and figures following to-wit:

77 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company
vs.
United States Railroad Labor Board } In Equity #2516.
et al.

Opinion by PAGE, *Cir. J.*

This is a bill by the Pennsylvania Railroad Company against the Labor Board and its members to enjoin them from functioning as a Board generally, and specifically from exercising the asserted right to control the selection of the conferees provided for in Section 301 of the Transportation Act.

Two claims are urged: (1) That the act is unconstitutional if, and in so far as, it attempts to impose compulsory arbitration; (2) That the act gives the Board no right on ex parte submission, nor on its own motion, to do any act under Section 301.

Defendants move to dismiss the bill, and urge: (1) That the Labor Board is an administrative arm of the government over which the courts have no jurisdiction; (2) That the Board had the power exercised by it under Decisions 119 (Exhibit 2) and 218 (Exhibit 4).

Defendants' so-called answer is no more than a statement of grounds urged for dismissal, with the orders and decisions referred to in the bill attached.

What the Board did is shown in the exhibits filed, and the only authority therefor is found in Title III of the Transportation Act.

I. The Transportation Act is entitled: "An Act" (a) "to provide for the termination of Federal control * * *"; (b) "to provide for the settlement of disputes between carriers and their employees"; (c) "to further amend" the Commerce Act of 1887. (41 Stats. at L. p. 457, approved Feb. 28, 1920.) It consists of five titles, viz.: I. Definitions; II, Termination of Federal control; III, Disputes between carriers and their employees and subordinate officials; IV,

Amendments to Interstate Commerce Act; V, Miscellaneous provisions.

Title III creates the Labor Board and other boards, and also covers the subject matter of "Disputes between carriers and their employees."

Congress, by the act of June 18, 1910, made very complete provision for suits against the Interstate Commerce Commission (36 Stats. at L. p. 539), yet the language in the Act of 1887, creating the Commission, was quite like the language creating the Labor Board, and the Supreme Court, in 1895, said:

"We think that the language of the statute, in creating the Commission, and in providing that it shall be lawful for the Commission to apply by petition to the Circuit Court sitting in equity, sufficiently implies the intention of Congress to create a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts." (Texas & Pacific Ry. v. I. C. C. 162 U. S. 197, 204.)

In my opinion the Labor Board is a body corporate, subject to the jurisdiction of the Federal courts, and may sue and be sued. This does not mean, however, that the courts have any general authority over the exercise of a discretion vested in an administrative body or officer (C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 569; German Alliance Ins. Co. v. Lewis, 233 U. S. 389).

II. The Adjustment Board that may be established under Section 302 of Title III have not been appointed, so that the powers vested in the Labor Board under Section 303 need not be considered.

Sections* 301, 307, 308 and 313 have, in the main, been made the subject of attack and discussion.

Sec. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute.

Sec. 307. (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive of any carrier

78 In arriving at the purpose of Congress and the right interpretation of the act, it will be helpful to look briefly

or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in section 301. The Labor Board may upon its own motion within ten days after the decision, in accordance with the provisions of section 301, of any dispute with respect to wages or salaries of employees or subordinate officials of carriers, suspend the operation of such decision if the Labor Board is of the opinion that the decision involves such an increase in wages or salaries as will be likely to necessitate a substantial readjustment of the rates of any carrier. The Labor Board shall hear any decision so suspended and as soon as practicable and with due diligence decide to affirm or modify such suspended decision.

(c) A decision by the Labor Board under the provisions of paragraphs (a) or (b) of this section shall require the concurrence therein of at least 5 of the 9 members of the Labor Board: Provided, That in case of any decision under paragraph (b), at least one of the representatives of the public shall concur in such decision. All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the Commission, and shall be given further publicity in such manner as the Labor Board may determine.

(d) All the decisions of the Labor Board in respect to wages or salaries and of the Labor Board or an Adjustment Board in respect to working conditions of employees or subordinate officials of carriers shall establish rates of wages and salaries and standards of working conditions which in the opinion of the board are just and reasonable. In determining the justness and reasonableness of such wages and salaries or working conditions the board shall, so far as applicable, take into consideration among other relevant circumstances:

- (1) The scales of wages paid for similar kinds of work in other industries;
- (2) The relation between wages and the cost of living;
- (3) The hazards of the employment;
- (4) The training and skill required;
- (5) The degree of responsibility;
- (6) The character and regularity of the employment; and
- (7) Inequalities of increases in wages or of treatment, the result of previous wage orders or adjustments.

Sec. 313. The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.

at previous legislation, and the conditions that produced such legislation.

In 1887, the regulation of common carriers in their relations to the public, particularly as to rates and service, was inaugurated by the passage of the Interstate Commerce Commission Act. That act has been extensively amended from time to time, and Title IV of the Transportation Act consists wholly of such amendments. At other times, Congress has legislated upon the question of safety appliances and other related matters.

In 1888, 1898 and 1913, acts were passed for the appointment of boards of arbitration. In none of those acts was there any compulsory submission to arbitration or mediation. Those acts seem to have been produced by conditions in the relations between the carriers and their employees, and were for the purpose of preventing the interruption of business and consequent inconvenience and loss to the public.

The exigencies of the late war made it necessary that the Government should take over the operation of the railroads and produced the "Federal Control Act" in 1918. The termination of Federal control is provided for in Title II of the Transportation Act.

Late in 1916, after a conference for the purpose of adjusting disputes between the carriers and their employees had failed and steps were being taken to call a general strike, the President said to Congress that there were no resources at law at his disposal for compulsory arbitration to prevent commercial disaster, property injury and the personal suffering of all, not to say starvation, which would be brought to many among the vast body of the people if the strike was not prevented, and asked for legislation. Congress responded with the Adamson law.

79 That law has been the subject of wide discussion, and it is not necessary to dwell upon it here, except to note that Congress there provided for an eight-hour day, and made other provisions that resulted in the actual raising of the wages of the employees of carriers. The Supreme Court sustained that act in *Wilson v. New*, 243 U. S. 332. The majority opinion was presented by the Chief Justice. Strong dissenting opinions were written, denying the constitutionality of the act.

Not only because of the diversity of opinion expressed in the New Case, but because of its wide public discussion, Congress must have had clearly before it the question as to the

conditions under which it had the right, if at all, to establish machinery by which to compel the compulsory fixing of wages, rules, etc., as between carriers and their employees.

I am of opinion that when Congress framed and adopted Section 301 it did so with the deliberate intention of imposing, as the plain language of the act indicates, the duty on all carriers and their officers, employees and agents to exercise every reasonable effort and adopt every available means to avoid any interruption of the business of any carrier growing out of any dispute between the carriers and their employees, and that Congress intended that all such disputes should be considered, and, if possible, decided in conference solely between a carrier and representatives of its employees directly interested in the dispute, and that, as hereinafter noted, the only power given to the Labor Board under that section was to hear and decide a dispute which the conferees provided for in Section 301 were unable to decide, and then only in the event that the parties jointly referred the matter to the Board.

The further conclusion is inevitable that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties, except that the Board might on its own motion suspend the operation of a decision by the parties if it was of the opinion that such decision as to salaries and wages would make a readjustment of the rates of any carrier necessary, and thereupon as soon as practicable affirm or modify such suspended decision (Sec. 307b).

It is, in a general way, claimed that the Board has the right to direct or control the method of selecting the representatives of the employees under Section 301, under the provisions of Section 308 (4), which is as follows:

The Labor Board "May make regulations necessary for the efficient execution of the functions vested in it by this title."

The appointment or method of election of conferees under Section 301 was not one of the functions delegated to the Board, and therefore it had not the right to make the regulations provided for in Decision No. 218 on pages 8, 9 and 10. I am of opinion that the purpose of section 301 was to leave to the carrier and its employees full liberty to get together in their own way.

The language of Section 307 strongly supports my conclusion upon Section 301, because Section 307 makes ample pro-

vision for intervention on the part of the Labor Board in all cases arising under the Act where the carrier and the employees have failed to compose their difficulties or upon such failure to join in a submission to the Labor Board, as provided in Section 301. This will more fully appear from the following discussion.

III. As noted above, no Adjustment Board has been appointed; therefore, Section 307 may be read without consideration of the provisions therein relating to the Adjustment Board. Such a reading shows that the Labor Board shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules or working conditions which is not decided as provided in Section 301, under the following circumstances:

"(1) Upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute;

"(2) Upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute; or,

"(3) Upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce."

The meaning of that language is too plain to need interpretation or construction.

Section 307 (b) authorizes the intervention of the Labor Board in precisely the same manner as provided in Section 307 (a) for the purpose of deciding "all disputes with respect to the wages or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301."

In considering the intent of Congress as to the force of the Labor Board's decisions as to other matters than those 80 jointly submitted to them under Section 301, there are two views pressing upon the mind of the court for consideration:

(1) Do the provisions of the act authorize the Labor Board merely to hear, determine and publish in an advisory decision that which in its opinion would be a fair and just wage, or what would be a fair and just solution of disputes involving grievances, rules or working conditions? or

(2) Does the act authorize the Labor Board to make such findings, and to render such decisions and judgments as will make its determination upon those questions final and binding, so that a rule, determined to be a fair and reasonable

rule by the Board, shall thereafter be a governing rule between the parties, and so that a wage determined to be a fair and reasonable wage shall thereafter be the wage that shall be paid by the carrier, and that shall be accepted by the employee, and that may be recovered in the courts?

There is no direct provision in the act that decisions by the Board shall be final and have the binding force of decrees to be performed. Nor is there any provision that that which is determined to be a just and reasonable wage or rule shall thereafter be the wage, or the rule, as between the carrier and its employees and upon which either may maintain an action in the courts. There is no provision for the enforcement of the terms of the decisions, nor any penalties for their violation, except the publication provided for in Section 313, if that may be considered a penalty.

All those matters seem to me to indicate that the decisions are only advisory.

On the other hand, Section 307 (d) provides that:

"All decisions of the Labor Board * * * shall establish rates of wages and salaries and standards of working conditions which in the opinion of the Board are just and reasonable."

Nevertheless, I have reached the conclusion that it was the belief of Congress that the results desired by the legislation could be attained through the force of public opinion and that that public opinion would follow the publication made as provided in Sections 307-(c) and 313, and would support the decisions of a board, composed of men each of whom would have special knowledge of the difficulties within and the necessities of the group that he was chosen to represent. I am further of the opinion that, acting upon that belief, Congress provided in Section 307 (d) for a wide and searching investigation so that the Board would have before it all the facts necessary to enable it to reach just and reasonable decisions upon every dispute.

IV. The remaining, and of course fundamental, question in this case is whether or not the act is within the constitutional power of Congress to regulate commerce. In *Gibbon v. Ogden*, 22 U. S. 1, Chief Justice Marshal said:

"Commerce, undoubtedly, is traffic, but it is something more—it is intercourse. It describes the commercial intercourse between nations, * * and is regulated by prescribing rules for carrying on that intercourse." (p. 188.)

After an extended discussion, the court further said (p. 195):

"We are now arrived at the inquiry—what is this power? It is the power to regulate; that is, to prescribe the rule by which commerce is to be governed. This power, like all others vested in congress, is complete in itself, may be exercised to its utmost extent, and acknowledges no limitations, other than are prescribed in the constitution."

Undoubtedly some character of intercourse by transportation is involved in every completed commercial transaction. Boys trading upon the playground or men trading in the market places make and lay the basis for their transactions by discussion or correspondence, but the commercial transaction must somehow, somewhere be completed by delivery. It may be the mere passage of the commodity involved in the trade from the pocket of one by hand to the hand of another, or it may be the carrying across the continent of bulky commodities involving every kind and character of handling and transportation devices and of men engaged in many kinds of employment, but whatever be the character of the transaction, whether it is great or small, the instruments of intercourse and transportation are indispensable elements in every commercial transaction.

The commerce dealt with in the act in question involves the main transportation systems both for passengers and freight for the people of the whole United States. It reaches, touches and carries for every city, village and town and is the instrument by which food, clothing and fuel and every other commodity of commerce is carried for and between the people. There is nothing in existence that could be substituted for it, and it represents the growth of years. If its 81 operation were to be discontinued for even a short space of time the loss and hardships necessarily consequent thereon would be almost incalculable; and if it were discontinued for any considerable length of time the whole fabric of the nation's commerce and the foundations of our manufactures, which are the basis of the great growth and development of our country and of our business prosperity, would be almost irretrievably wrecked.

Neither bigness nor emergency can bestow or add to the constitutional power to regulate commerce, and I have set out the matters immediately foregoing for the sole purpose of illustrating the large place which the agreements and disagreements between carriers and their employees occupy in

the transportation element of interstate commerce, and how inadequate must be the regulation if Congress does not have the power to control such agreements and disagreements.

It is of the fundamentals of a common carrier system that it shall be as efficient as the conditions in business will permit, that it shall be continuous, that it shall give equal service to all of the people upon equal terms, that it shall have fair and reasonable compensation for the services rendered.

I can see no difference in character between those regulatory powers sustained and in operation under the Interstate Commerce Act for more than forty years and the power to ascertain just and reasonable wages and working conditions as contemplated in Title III of the Transportation Act. If the power to regulate commerce is a power to prescribe rules by which commerce is to be governed, then Congress must have the power to prescribe every regulatory or governing measure necessary to keep the commerce of this country alive and the common carriers going concerns.

If the common carrier system of this country may lawfully be stopped for one hour by the carrier or by the employees, organized or unorganized, not by reason of any necessity in the business of common carrying, but because either party wills it, or through the disagreement of the parties, then it may be stopped for the same reason or for no reason at all for an indefinite time or perpetually, and the constitutional power of Congress would be as impotent and useless as a dead hand upon the ship's rudder in a storm.

In the case of *Wilson v. New*, 243 U. S. 332, the constitutionality of the Adamson Act was challenged by some of the dissenting justices upon the ground that it violated the Fifth Amendment, first, because an attempt to fix any wage is in violation of the right of private contract, and second, that the provision in the Adamson Act that only an eight-hours' service by an employee should be given for ten hours' pay was in violation of the inhibition in the constitution against taking property without due process of law. The argument there was that the act, without any investigation on the part of Congress or under its authority as to the conditions of pay and employment in the carrying trade, wrongfully and arbitrarily gave to the employees some \$600,000,000 of the carriers' money. The method that was there asserted to have been an arbitrary exercise of power is not present in this case. The act here, on the contrary, makes very careful provision, as hereinbefore shown, for the selection of a well

qualified board, prescribes a wide field of investigation and a careful consideration of every element involved, to the end that conclusions may and shall be reached by the Labor Board which shall be just and reasonable.

Upon the question of the right to prescribe compulsory arbitration or to fix wages, the majority opinion of the court in the case of *Wilson v. New*, *supra*, determines that question, supports the power exercised by Congress, and consequently sustains the constitutionality of the act.

There is, and can be, no conflict between the Fifth Amendment and the commerce regulation clause of the constitution because whenever men and property enter into and become a part of an interstate common carrier system, they so far lose their private character that they become wholly subject to all reasonable regulatory measures prescribed by Congress.

Motion to dismiss is denied.

(Endorsed) Filed May 4, 1922. John H. R. Jamar, Clerk.



83 And afterwards on, to wit, the 4th day of May, 1922,
this matter coming on to be heard, the following Decree
was entered by the Court:

84 IN THE DISTRICT COURT OF THE UNITED STATES
For the Northern District of Illinois,
Eastern Division.

Decree
May

Thursday, May 4, 1922

Present: Honorable George T. Page, Circuit Judge.

The Pennsylvania Railroad Company,

vs.

United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, Arthur O. Whar-
ton, Walter L. McMenimen, Horace
Baker, John H. Elliott, Albert
Phillips, and Samuel Higgins.

} In Equity
No. 2516.

Now comes The Pennsylvania Railroad Company, by its so-
licitors, and come also the United States Railroad Labor
Board and R. M. Barton, G. W. W. Hanger, Ben W. Hooper,
Arthur O. Wharton, Walter L. McMenimen, Horace Baker,
John H. Elliott, Albert Phillips, and Samuel Higgins, as
members of said United States Railroad Labor Board; and
it appearing to the Court that on the 9th day of December,
1921, a temporary restraining order was entered herein, re-
straining the said United States Railroad Labor Board and
R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O.
Wharton, Walter L. McMenimen, Horace Baker, John H.
Elliott, Albert Phillips and Samuel Higgins from making
any publication under said Section 313 of Title III of the
Transportation Act of 1920 declaring that the Pennsylvania
Railroad Company had violated decision No. 218 of said
Labor Board, until 10:00 o'clock A. M. December 10, 1921;
and it further appearing to the Court that thereafter and
on the 10th day of December, 1921, the said temporary re-
straining order as entered herein theretofore on the 9th day
of December, 1921, was by order of Court continued in full
force and effect until the hearing upon the merits or until
said order should be dissolved; and it appearing to the Court
that the said United States Railroad Labor Board and the
said R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Ar-

thur O. Wharton, Walter L. McMenimen, Horace Baker, John H. Elliott, Albert Phillips and Samuel Higgins as members of said Board, by their solicitors, entered their respective appearances herein on the 29th day of December, 1921; and it further appearing to the Court that thereafter, on the 29th day of December, 1921, the said United States Railroad Labor Board and the said R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, John H. Elliott, Albert Phillips and Samuel Higgins respectively filed a motion to dismiss the bill herein; and it further appearing to the Court that on the 3rd day of April, 1922, said United States Railroad Labor Board and the said R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, John H. Elliott, Albert Phillips and Samuel Higgins respectively filed a so-called answer and motion to dismiss said bill; and this cause coming on to be heard upon the said motions to dismiss said bill, the case was heard on the bill, motion to dismiss, answer and exhibits thereto, all of which are considered and made part of the record. And the Court having inspected the bill herein and the respective exhibits filed by the parties hereto, and having heard the arguments of counsel for the respective parties:

The Court, being fully advised in the premises, finds that it has jurisdiction of the parties and the subject-matter hereof, and that said motions to dismiss the bill herein, and each thereof, should be and hereby are respectively denied.

And now again come the respective parties, by their solicitors, and the defendants, and each of them, having refused to answer or plead further, and having in open court announced that they respectively abide by their said so-called answer and motions to dismiss, and the Court being fully advised in the premises,

It Is Therefore Ordered, Adjudged and Decreed that the United States Railroad Labor Board and R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, John H. Elliott, Albert Phillips and Samuel Higgins, as members thereof, their servants, employes and agents and all persons acting under the control or authority of any and all of said defendants, be and hereby are perpetually enjoined in manner and form as follows:

(1) From assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act, unless and until there has been a joint sub-

mission of a dispute by the carrier and the employees, which has been the subject matter of conference between them.

(2) Upon such joint submission the Board may proceed to hear and determine disputes only under and in accordance with the general provisions of Title III of the Transportation Act.

(3) From making publication of any matter based upon action taken by the Board not in harmony with Item 1 hereof.

To which decree, and each and every part thereof, the defendants by their counsel, jointly and severally, object and except.

GEO. T. PAGE,
Judge.

87 And on, to wit, the 5th day of May, 1922, came the ^{Petition} _{appealed} defendants by their attorneys and filed in the Clerk's ^{May} office of said Court a certain Petition for Appeal, in words and figures following, to wit:

88 UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company, *Complainant,*
vs.
United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, *Defendants.*

In Equity
No. 2516.

PETITION FOR APPEAL.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, as the members of the United States Railroad Labor Board, defendants, feeling themselves aggrieved

by the final order or decree of the District Court made and entered May 4, 1922, by their counsel, pray an appeal therefrom to the United States Circuit Court of Appeals for the Seventh Circuit.

The particulars wherein the defendants consider the final order or decree erroneous are set forth in the assignment of errors on file to which reference is made.

The defendants pray that a transcript of the record, proceedings, and papers on which the final order or decree was made and entered, duly authenticated, may be transmitted forthwith to the United States Circuit Court of Appeals.

BLACKBURN ESTERLINE

Special Assistant to the Attorney General.

CHARLES F. CLYNE

United States Attorney.

EDWIN L. WEISL

Assistant United States Attorney.

R. M. BARTON,

Of Counsel.

(Endorsed) Filed May 5, 1922. John H. R. Jamar, Clerk.

89 And on, to wit, the 5th day of May, 1922, came the defendants by their counsel and filed in the Clerk's office of said Court a certain Assignment of Errors, in words and figures following, to wit:

UNITED STATES DISTRICT COURT

Filed
1922Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company, *Complainant,*
vs.
United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, *Defendants.*

In Equity
No. 2516.

ASSIGNMENT OF ERRORS.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, as members of the United States Railroad Labor Board, defendants, now come, by their counsel, and in connection with their petition for appeal, file the following assignment of errors on which they will rely on their appeal to the United States Circuit Court of Appeals for the Seventh Circuit from the final order or decree of the District Court made and entered May 4, 1922, in the above entitled cause.

The District Court erred:

I. In holding and adjudging that the United States Railroad Labor Board is a body corporate subject to the jurisdiction of the Federal courts; that it may sue and be sued, and that the United States District Court for the Northern District of Illinois has jurisdiction of the parties and the subject-matter contained in the bill of complaint.

91 II. In deciding, holding and adjudging as follows:

"Congress, by the act of June 18, 1910, made very complete provision for suits against the Interstate Commerce Commission (36 Stats. at L. p. 539), yet the language in the Act of 1887, creating the Commission, was quite like the lan-

guage creating the Labor Board, and the Supreme Court, in 1895, said:

'We think that the language of the statute, in creating the Commission, and in providing that it shall be lawful for the Commission to apply by petition to the Circuit Court sitting in equity, sufficiently implies the intention of Congress to create a body corporate with legal capacity to be a party plaintiff or defendant in the Federal courts.' (Texas & Pacific Ry. v. I. C. C. 162 U. S. 197, 204.)

In my opinion the Labor Board is a body corporate, subject to the jurisdiction of the Federal Courts, and may sue and be sued. This does not mean, however, that the courts have any general authority over the exercise of a discretion vested in an administrative body or officer (C. B. & Q. R. R. Co. v. McGuire, 219 U. S. 569; German Alliance Ins. Co. v. Lewis, 233 U. S. 389).'' (Op. p. 2)

III. In not holding and adjudging that the suit is against the United States and the Government thereof for which no authority or consent has been given by the United States.

IV. In not holding and adjudging that the United States District Court was without jurisdiction, power or authority to control by writ of injunction or otherwise the administration, discretion and action of the United States Railroad Labor Board and the members thereof in the discharge of their functions under Title III of the Transportation Act of 1920.

V. In substituting the judgment and discretion of the United States District Court for the judgment and discretion of the United States Railroad Labor Board and the members thereof in a matter which rested for its determination exclusively within the jurisdiction of the United States Railroad Labor Board and the members thereof.

92 VI. In holding and adjudging that the United States District Court had jurisdiction, power and authority to control by writ of injunction or otherwise, the administration, discretion and action of the United States Railroad Labor Board and the members thereof, after holding that Title III of the Transportation Act of 1920 was constitutional and valid in its entirety and that the decisions of the United States Railroad Labor Board and the members thereof are only advisory.

VII. In deciding, holding and adjudging as follows:

"I am of opinion that when Congress framed and adopted Section 301 it did so with the deliberate intention of imposing, as the plain language of the act in-

dicates, the duty on all carriers and their officers, employees and agents to exercise every reasonable effort and adopt every available means to avoid any interruption of the business of any carrier growing out of any dispute between the carriers and their employees, and that Congress intended that all such disputes should be considered and, if possible, decided in conference solely between a carrier and representatives of its employees directly interested in the dispute, and that, as hereinafter noted, the only power given to the Labor Board under that section was to hear and decide a dispute which the conferees provided for in Section 301 were unable to decide, and then only in the event that the parties jointly referred the matter to the Board.

"The further conclusion is inevitable that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties, except that the Board might on its own motion suspend the operation of a decision by the parties if it was of the opinion that such decision as to salaries and wages would make a readjustment of the rates of any carrier necessary, and thereupon as soon as practicable affirm or modify such suspended decision (Sec. 307b)." (Op. p. 5)

VIIIa. In deciding, holding and adjudging that the United States Railroad Labor Board and the members thereof decided the dispute under Section 301 exclusively and without regard to the other sections of Title III.

93 VIII. In deciding, holding and adjudging as follows:

"The appointment or method of election of conferees under Section 301 was not one of the functions delegated to the Board, and therefore it had not the right to make the regulations provided for in Decision No. 218 on pages 8, 9 and 10. I am of opinion that the purpose of section 301 was to leave to the carrier and its employees full liberty to get together in their own way.

"The language of Section 307 strongly supports my conclusion upon Section 301, because Section 307 makes ample provision for intervention on the part of the Labor Board in all cases arising under the Act where the carrier and the employees have failed to compose their difficulties or upon such failure to join in a submission to the Labor Board, as provided in Section 301." (Op. p. 6)

IX. In issuing the permanent injunction.

X. In making and entering the following order or decree:

"It Is Therefore Ordered, Adjudged and Decreed that the United States Railroad Labor Board and R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, John H. Elliott, Albert Phillips and Samuel Higgins, as members thereof, their servants, employes and agents and all persons acting under the control or authority of any and all of said defendants, be and hereby are perpetually enjoined in manner and form as follows:

(1) From assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act, unless and until there has been a joint submission of a dispute by the carrier and the employes which has been the subject-matter of conference between them.

(2) Upon such joint submission the Board may proceed to hear and determine disputes only under and in accordance with the general provisions of Title III of the Transportation Act.

(3) From making publication of any matter based upon action taken by the Board not in harmony with Item 1 hereof."

XI. In overruling the motions of the defendants to dismiss the bill of complaint on the grounds set forth in the respective motions and in not sustaining the motions and each of them.

XII. In not sustaining the motion to dissolve the preliminary injunction, and in not dismissing the bill of complaint.

94 Wherefore, defendants pray that the final order or decree of the District Court entered May 4, 1922, be reversed, annulled, and set aside, with directions that the permanent injunction and the preliminary injunction shall be dissolved and the bill of complaint dismissed, and for such other and further order as may be appropriate.

BLACKBURN ESTERLINE.

Special Assistant to Attorney General.

CHARLES F. CLYNE

United States Attorney.

EDWIN L. WEISL

Assistant United States Attorney.

R. M. BARTON

Of Counsel.

(Endorsed) Filed May 5, 1922. John H. R. Jamar, Clerk.

98 And on to-wit: the 8th day of May, 1922, come United States Railroad Labor Board, et al., as principals, and United States Fidelity & Guaranty Company, as surety, and filed in the Clerk's office of said Court, in said entitled cause, a certain Bond on Appeal, in words and figures following, to-wit:

99 Know all Men by these Presents, That we, United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, as members thereof as principals, and United States Fidelity & Guaranty Company, a corporation, as surety, are held and firmly bound unto The Pennsylvania Railroad Company, a corporation, in full and just sum of Two Hundred and fifty dollars (\$250.00) to be paid to the said The Pennsylvania Railroad Company, a corporation, its attorneys, executors, administrators, or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors and administrators, jointly and severally, firmly by these presents. Sealed with our seals and dated this sixth day of May in the year of our Lord one thousand nine hundred and twenty-two.

Whereas, lately at a session of the District Court of the United States for the Northern District of Illinois, in a suit pending in said Court, between The Pennsylvania Railroad Company, a corporation, as plaintiff, and United States Railroad Labor Board and the members thereof, as defendants, a decree was rendered against the said defendants and the said defendants having obtained from said Court an order allowing an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, and filed a copy thereof in the Clerk's Office of the said Court to reverse the decree of the aforesaid suit, and a citation directed to the said The Pennsylvania Railroad Company, a corporation, citing and admonishing it to be and appear at the United States Circuit Court of Appeals for the Seventh Circuit, to be holden at Chicago within thirty days from the date thereof.

Now, the condition of the above obligation is such, That if the said United States Railroad Labor Board and the members thereof shall prosecute their said appeal to effect, and shall answer all damages and costs that may be awarded against them if they fail to make their plea good, then the

above obligation to be void; otherwise to remain in full force and virtue.

U. S. RAILROAD LABOR BOARD (Seal)
By BEN W. HOOPER,
Chm.

BEN W. HOOPER,
R. M. BARTON,
G. W. W. HANGER,
A. O. WHARTON,
W. L. McMENIMEN,
HORACE BAKER,
J. H. ELLIOTT,
ALBERT PHILLIPS,
SAMUEL HIGGINS,

By R. M. BARTON (Seal)
Atty. & Counsel.

UNITED STATES FIDELITY & GUARNTY COMPANY (Seal)
By HENRY M. MARSHALL and
FRED C. HACHTEL,

Attorneys-in-Fact.

(Seal)

Sealed and delivered in presence of—

Approved by—
GEO. T. PAGE,
Judge.

5—8—22.

(Endorsed) Filed May 8, 1922. John H. R. Jamar, Clerk.

95 And afterwards on, to wit, the 5th day of May, 1922,
this matter coming on to be heard, the following order
was entered by the Court:

UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division.

Order
Ma
all
app

Friday, May 5, 1922.

Present: Honorable George T. Page, Circuit Judge.

The Pennsylvania Railroad Company,

Complainant,

vs.

United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, A. O. Wharton,
W. L. McMenimen, Horace Baker,
J. H. Elliott, Albert Phillips and
Samuel Higgins,

Defendants.

} In Equity
No. 2516.

ORDER ALLOWING APPEAL.

In the Above Entitled Cause, United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins as the members of the United States Railroad Labor Board, having made and filed their petition praying an appeal to the United States Circuit Court of Appeals for the Seventh Circuit, from the final order or decree of the District Court made and entered May 4, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of court in such case made and provided:

It is Ordered and Decreed that the appeal be and the same is hereby allowed as prayed and made returnable within thirty (30) days from the date hereof; and the clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings, and papers on which said order or decree was made and entered forthwith to the United States Circuit Court of Appeals for the Seventh Circuit.

97 It Is Further Ordered that the bond on appeal in the sum of Two Hundred and fifty (\$250.00) dollars and con-

ditioned as required by law be filed within twenty (20) days from the date hereof.

GEO. T. PAGE,
Judge.

5-5-22.

for
not of
filed
100

UNITED STATES DISTRICT COURT
Northern District of Illinois,
Eastern Division.

The Pennsylvania Railroad Company,
Complainant.

vs.

United States Railroad Labor Board,
R. M. Barton, G. W. W. Hanger,
Ben W. Hooper, A. O. Wharton,
W. L. McMenimen, Horace Baker,
J. H. Elliott, Albert Phillips and
Samuel Higgins,
Defendants.

In Equity
No. 2516.

PRAECEIPE FOR RECORD.

To the Clerk:

Please prepare a transcript of the record in the above-entitled cause in the matter of the appeal of United States Railroad Labor Board and the members thereof and include therein, in the order given below, the following:

1. Bill of Complaint.
2. Temporary restraining order.
3. Motion of defendants to dismiss.
4. Answer of defendants with Exhibits attached thereto and filed therewith, Nos. 1, 2, 3, 4, 5 and 6.
5. Plaintiff's Exhibit No. 1.
6. Motion to dissolve temporary restraining order.
7. Order of hearing and submission.
8. Opinion of District Court.
9. Final decree.
10. Petition for appeal.
11. Assignment of errors.

101 12. Order allowing appeal.
 13. Bond.
 14. Praecepta.
 15. Citation.

BLACKBURN ESTERLINE
Special Assistant to the Attorney General.

Service of a copy of the foregoing praecipe is hereby acknowledged, this 8th day of May, A. D. 1922.

LOESCH, SCOFIELD, LOESCH & RICHARDS,
*Solicitor for The Pennsylvania Railroad
Company.*

(Endorsed) Filed May 8, 1922. John H. R. Jamar, Clerk.

102 Northern District of Illinois { ss:
Eastern Division

**Certified
clerk**

I, John H. R. Jamar, Clerk of the District Court of the United States for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and complete transcript of the proceedings had of record made in accordance with Praeclipe filed in this Court in the cause entitled The Pennsylvania Railroad Company vs. United States Railroad Labor Board, et al., No. 2516, as the same appear from the original records and files thereof now remaining in my custody and control.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office, in the City of Chicago, in said District, this 8th day of May, A. D. 1922.

JOHN H. R. JAMAR

(Seal)

103

CITATION ON APPEAL.

United States } ss:
of America,

To The Pennsylvania Railroad Company: Greeting:

You are hereby notified that in a certain cause in equity in the United States District Court for the Northern District of Illinois, Eastern Division, wherein The Pennsylvania Railroad Company is complainant and United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins as the members of the United States Railroad Labor Board, are defendants, an appeal has been allowed to the defendants to the United States Circuit Court of Appeals for the Seventh Circuit.

You are hereby cited and admonished to be and appear in the United States Circuit Court of Appeals, in the city of Chicago, County of Cook, and State of Illinois, thirty (30) days after the date of this citation to show cause, if any there be, why the final order or decree appealed from should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable Geo. T. Page, holding the United States District Court for the Northern District of Illinois, this 5th day of May, A. D. 1922.

GEO. T. PAGE,

Service of the within citation and the receipt of a copy thereof are hereby acknowledged this 5 day of May, A. D. 1922.

T. J. SCOFIELD
Solicitor for Appellee.

(Endorsed) 2516 Citation Filed May 6, 1922 at
o'clock M. John H. R. Jamar Clerk.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages, numbered from 1 to 158, inclusive, contain a true copy of the printed record, printed under my supervision and filed May 19, 1922, on which the following entitled cause was heard and determined:

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, as the members of the United States Railroad Labor Board,

vs.

The Pennsylvania Railroad Company

No. 3139, October Term, 1921, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of August, A. D. 1922.

(Seal)

EDWARD M. HOLLOWAY,
*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*



At a regular term of the United States Circuit Court of Appeals for the Seventh Circuit, begun and held in the United States Court room, in the city of Chicago, in said Seventh Circuit on the fourth day of October, 1921, of the October term in the year of our Lord one thousand nine hundred and twenty-one and of our Independence the one hundred and forty sixth.

And afterwards, to wit: On the twenty-fourth day of May, 1922, there was filed in the office of the clerk of this court a certain certified copy of an order of the District Court of the United States for the Northern District of Illinois, Eastern Division, entered December 10, 1921, which said certified copy of Order is in the words and figures following, to wit:

IN THE DISTRICT COURT OF THE UNITED STATES

For the Northern District of Illinois

Eastern Division

December 10, 1921.

Present: Honorable Kenesaw M. Landis, District Judge.

The Pennsylvania Railroad Company }
 vs. }
United States Railroad Labor Board, }
R. M. Barton, G. W. Hanger, Ben }
W. Hooper, Arthur O. Wharton, }
Walter L. McMenimen, Horace }
Baker, John H. Elliott, Albert Phil- }
lips and Samuel Higgins. } In Equity No. 2516.

This cause coming on for hearing before the Honorable Kenesaw M. Landis, District Judge, on the motion of the Pennsylvania Railroad Company, for an order to restrain the United States Railroad Labor Board from publishing under the provisions of Section 313 of Title III of the Railroad Transportation Act of 1920 that the Pennsylvania Railroad Company had violated Decision No. 218:

It appearing to the Court that in accordance with the order

Order.

entered herein on the 9th day of December, 1921, the plaintiff served the United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, with notice that it would appear before the Honorable Kenesaw M. Landis, District Judge, in the room usually occupied by him as a court room in the Federal Building in Chicago, Illinois, at 10:00 o'clock A. M., on Saturday, December 10, 1921, and ask the Court to hear its Application for Injunction against the United States Railroad Labor Board and the members of the said Board respectively, or to continue the temporary restraining order entered herein on the 9th day of December, 1921, until such time as the Court shall finally dispose of the matter upon its merits:

And now on this 10th day of December, 1921, this cause coming on for hearing under and pursuant to the said notice, and the said United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins appearing by counsel, in response to said notice, and the said United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, Arthur O. Wharton, Walter L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins not being ready to enter upon the hearing, move the Court that hearing herein be deferred to a future day, the plaintiff not opposing said motion. It is Ordered by the Court that the further hearing herein be continued to Dec. 21st, 1921, and that the restraining order entered herein on the 9th day of December, 1921, be, and the same is hereby, continued in full force and effect until the hearing herein upon the merits or until said order is sooner dissolved.

Enter:

K. M. L.
District Judge

IN THE DISTRICT COURT OF THE UNITED STATES OF AMERICA

For the Northern District of Illinois,

Eastern Division.

I, John H. R. Jamar, Clerk of the District Court of the United States of America for the Northern District of Illinois, do hereby certify the above and foregoing to be a true and correct copy of an order made and entered in said Court on the 10th day of December, A. D. 1921, as fully as the same appears of record in my office.

In Testimony Whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Chicago, in said District this 22nd day of May, A. D. 1922.

JOHN H. R. JAMAR,
Clerk.

(Seal)

Endorsed: Filed May 24, 1922 Edward M. Holloway,
Clerk.

And afterwards, to wit: On the twenty-sixth day of May, 1922, in the October term aforesaid, come the Appellee by its counsel, Messrs. Frank J. Loesch, T. J. Scofield, C. F. Loesch, C. B. Heiserman, and E. H. Seneff and filed in the office of the Clerk of this Court their appearance, which said appearances are in the words and figures following, to wit:

UNITED STATES CIRCUIT COURT OF APPEALS
For The Seventh Circuit.

No. 2984

October Term, 1921.

United States Railroad Labor Board, *et al.*
Appellants,
vs.

The Pennsylvania Railroad Company,
Appellee.

The Clerk will enter our appearance as counsel for the Appellee.

FRANK J. LOESCH
T. J. SCOFIELD
C. F. LOESCH
1540-10 So. La Salle St.,
Chicago, Illinois.

C. B. HEISERMAN,
General Counsel,
Philadelphia, Pa.
E. H. SENEFF,
General Solicitor,
Pittsburgh, Pa.
Of Counsel.

Endorsed: Filed May 26, 1922. Edward M. Holloway,
Clerk.

And afterwards, to wit: On the thirty-first day of May, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Wednesday, May 31, 1922.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

Before:

Hon. Francis E. Baker, Presiding Judge.

United States Railroad Labor
Board, *et al.* }
3139 *vs.* }
The Pennsylvania Railroad Company. }
 Appeal from the District Court
 of the United States for the
 Northern District of Illinois,
 Eastern Division.

It is now here ordered that this cause be, and the same is hereby set down for hearing Friday, June 2, 1922.

And afterwards, to wit: On the second day of June, 1922, in the October term aforesaid, the following further proceedings were had and entered of record, to wit:

Friday, June 2, 1922.

Court met pursuant to adjournment and was opened by proclamation of crier.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.
Robert R. Levy, Marshal.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

United States Railroad Labor
Board, *et al.*
3139 *vs.*
The Pennsylvania Railroad Com-
pany.

Appeal from the District Court
of the United States for the
Northern District of Illi-
nois, Eastern Division.

Now this day come the parties by their counsel and this cause now comes on to be heard on the printed record and briefs of counsel and on oral arguments by Mr. William D. Riter and Mr. Blackburn Esterline, counsel for appellants, and by Mr. Timothy J. Scofield and Mr. C. B. Heiserman, counsel for appellee, and the Court having heard the same takes this matter under advisement.

And afterwards, to wit: On the twentieth day of July, 1922, in the October term last aforesaid, there was filed in the office of the Clerk of this Court the Opinion of the Court, which said Opinion is in the words and figures following, to wit:

IN THE

UNITED STATES CIRCUIT COURT OF APPEALS,
FOR THE SEVENTH CIRCUIT.

No. 3139.

OCTOBER TERM, 1921, APRIL SESSION, 1922.

UNITED STATES RAILROAD LABOR
BOARD, R. M. BARTON, G. W. W.
HANGER, BEN W. HOOPER, A. O.
WHARTON, W. L. McMENIMEN, HOR-
ACE BAKER, J. H. ELLIOTT, ALBERT
PHILLIPS and SAMUEL HIGGINS,
Appellants,
vs.
THE PENNSYLVANIA RAILROAD
COMPANY,
Appellee.

Appeal from the District Court
of the United States for
the Northern District of
Illinois, Eastern Division.

Before BAKER, ALSCHULER and EVANS, *Cir. JJ.*

The appeal is by the United States Labor Board and its members from a decree in the suit of the Pennsylvania Railroad Company, enjoining the Board and its members from proceeding under section 301 of the Transportation Act, from determining a dispute concerning rules and working conditions, unless there has been a joint submission of the dispute to the Board by appellee carrier and its employees, and from making publication of any decision as to matters submitted, contrary to the injunctive order.

Under the "Possession and Control Act" of August 29, 1916, the President, on December 28, 1917, took over most of the railroads of the country, including those of appellee, and operated them through the Director General of Railroads until March 1, 1920, when pursuant and subject to the "Transportation Act" of February 28, 1920, the railroads reverted to their respective owners. Increases in wages and changes in rules and working conditions had been made by the Director General of Railroads under so-called national agreements negotiated between the Director General of Railroads and or-

ganizations representing employees, and further increases and changes had been demanded by the employees, through these organizations. The further demands were by the Director General transmitted to the President in August, 1919, and were pending and undetermined at the time of the enactment of the Transportation Act. It seems that at the suggestion of the President conferences for the adjustment of these matters had been carried on from March 10 to April 1, 1920, between the employers and organizations representing the employees, but without success, and when the Railroad Labor Board was created by Title III of the Transportation Act and its members confirmed by the Senate (April 15, 1920), it assumed jurisdiction of such demands, and proceeded to deal with them. In the hearing, which lasted about three months, the carriers (including appellee) and the organizations, assuming to represent the employees, participated. The Board rendered its decision, covering wage demands, July 20, 1920 (Decision No. 2), and in the decision it stated:

“There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages. Adequate investigation and consideration of these questions would demand time. Existing conditions required that the Board should make as early decision of the wage question as practicable. For that reason it has been necessary,—and both parties to the controversy have indicated it to be their judgment and wish, that the Board should separate the questions involving rules and working conditions from the wage questions. Accordingly, the Board has not undertaken herein to consider or change the rules and agreements now existing or in force by the authority of the United States Railroad Administration or otherwise and this decision will be so understood and applied.

“The Board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration and determination of the questions pertaining to the continuation or modification of such rules, conditions and agreements no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions and agreements, further

hearings will be had at the earliest practicable date and decision thereon will be rendered as soon as adequate consideration can be given.

"It is further declared that this Board, finding it necessary to adopt a basis for the rates and advances decided on, has adopted the rates established by or under the authority of the United States Railroad Administration. The intent of this decision is that the named increase except as otherwise stated shall be added to the rate of compensation established by and under the authority of the United States Railroad Administration."

The decision awarded the employees substantial wage increases, effective as of May 1, 1920, and provided that the wages fixed were on the basis that working conditions in all branches of the service should remain in effect until changed as provided by the Transportation Act.

April 14, 1921, the Board promulgated its decision No. 119 respecting rules and working conditions, which begins as follows:

"This decision determines the undecided portion of the dispute between the carriers and organizations of their employees referred to the Labor Board, April 16, 1920. That dispute was what should constitute reasonable wages and working conditions on the carriers parties thereto. On July 20, 1920, this Board decided the wage portion. It now decides upon a method of arriving at rules regulating working conditions." (pp. 69-70.)

In the decision it is stated that "the carriers parties hereto maintain that the direction of this Board in Decision No. 2, extending the National Agreements, orders, etc., of the Railroad Administration as a *modus vivendi* should be terminated at once; and that the matter should be remanded to the individual carriers and their employees for negotiation and individual agreement." The decision finds that it would not be proper to extend indefinitely the national agreements, but that it would be inadvisable to terminate them at once, as thereby many carriers and their employees would be without rules regulating working conditions, and it was ordered that the extension, as provided in Decision No. 2, end on July 1, 1921. The decision called upon the officers of the carriers and the organizations of employees to designate representatives to confer and decide so far as possible respecting rules and working conditions for each such carrier, such conferences to begin at the earliest possible date, and to keep

the Labor Board informed of agreements and disagreements so that the Board may know prior to July 1, 1921, what portion of the dispute has been decided. It was provided in the decision that rules agreed to by such conferences should be consistent with certain stated principles. Appellee, while resisting the right of the Board to impose upon it any limitations or principles respecting the subject, objects more specifically to principles numbered 5 and 15, which are;

"The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management."

"The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

June 27, 1921, the Labor Board promulgated an addendum to Decision No. 119 reciting that pursuant to Decision No. 119 some of the carriers had reached agreements with their employees and that some had not; setting forth certain rules and conditions to be effective July 1, 1921, upon such railroads as had not reached an agreement with their employees, to remain in force until final decision by the Labor Board on the subject of rules and working conditions.

July 26, 1921, Decision No. 218, was promulgated by the Board. This was on an *ex parte* complaint or submission to the Board by the Federated Shop Crafts of the Pennsylvania System, and from the decision it appears that on May 24, 1921, after the promulgation of Decision No. 119, representatives of appellee met officers of System Federation No. 90, which purports to be an organization of the employees of the Pennsylvania System, affiliated with the American Federation of Labor, and at such meeting the Federation No. 90 officers stated that they represented a majority of the employees of appellee's system, and were prepared to negotiate rules pursuant to Decision No. 119; that the representatives of the carrier refused to negotiate with them on the ground that there was not proof that Federation No. 90 represented a majority of the employees; and the representatives of the carrier announced appellee had prepared and would send out

ballots whereon the employees should designate their representatives; that the officers of Federation No. 90 objected to this ballot because it was not in accordance with the principles 5 and 15 of Decision No. 119, in that it made no provision for representation by an organization, but specified that those selected must be natural persons, and such only as are employees of appellee, and provided that the representatives of the employees be selected regionally rather than from the whole system; that it was then proposed by the officers of Federation No. 90 to amend the ballot so as to permit employees to vote for an organization to represent them if they so desired, which proposal the representatives of this carrier declined; that the officers of Federation No. 90 thereupon issued a ballot of their own on which System Federation No. 90 appeared as the employees' representative. The result of this was two separate elections, one at which the ballots prepared by the Company were voted, and at the other the ballots prepared by System Federation No. 90 providing only for representation by Federation No. 90. Decision No. 218 found that neither ballot was proper, and that both elections were void; that those so chosen were not the representatives of the employees, and that rules and working conditions consented to by either of them were void. A new election of representatives of the employees was ordered, rules for the election prescribed, and a form of ballot specified, making provision for voting for an organization as representative or for individuals. It appears that after the holding of the first election, appellee's representatives and the representatives chosen at the election whereat were voted the ballots prepared by appellee, agreed on rules and working conditions, which thereupon were put in force on appellee's system.

Appellee thereupon applied to the Board to vacate its Decision No. 218, and on September 16, 1921, the Board promulgated a further decision declining so to vacate, but permitting appellee to be heard on certain questions, among them the question of whether the ratification of the rules was by representatives of the employees fairly selected by a majority of such crafts. No election under the direction of Decision No. 218 appears from the record to have yet been held.

Opinion by ALSCHULER, *Cir. J.*, after foregoing statement.

Appellee contends that if Title III makes the decisions of the Labor Board binding upon the carriers, and enforceable by appropriate proceedings, it is unconstitutional. Suffice it to say, there is not here involved any proceeding for the

enforcement on the carrier of a decision of the Board as to wages or working conditions. Indeed, the action of the Board most complained of by appellee was in furtherance of securing an agreement between the carriers and their employees, with the probable alternative that if ultimately they fail to agree, the Board itself will decide upon and prescribe rules and working conditions. If and when this stage is reached, and one or both of the parties refuse to obey the Board's decision, it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties.

The decree seems to be predicated upon the assumption that the action of the Labor Board in these matters was wholly under the provisions of section 301 of the Transportation Act, and that in the absence of a joint submission of the dispute to the Board it was wholly without jurisdiction. Section 301 imposes the duty on carriers and employees to make all reasonable effort to avoid interruption of operation through disputes between them, and to confer together and reach an agreement wherever possible, and where disputes are not so decided they "shall be referred by the parties thereto to the Board which, under the provisions of this Title III, is authorized to hear and decide such disputes."

Sections following must be looked to for creation of the appropriate boards, the scope of their jurisdiction and the manner of its exercise. Section 302 authorizes carriers and their employees by agreement to establish Railroad Boards of Labor Adjustment. Section 303 makes it the duty of the Adjustment Board to hear disputes "involving *only* grievances, rules or working conditions," not decided as provided in section 301 (which would be by agreement between carriers and employees). This section specifies that the Adjustment Board shall act, (1) upon application of the carrier or of an organization of employees whose members are directly interested in the dispute; (2) upon petition of not less than 100 unorganized employees; (3) on the Adjustment Board's own motion; or (4) on request of the Labor Board when that Board is of opinion that the dispute is likely to interrupt commerce. Section 304 establishes the Labor Board. Section 307 (a) provides that the Labor Board shall hear and decide disputes concerning grievances, rules or working conditions where an Adjustment Board certifies that it has failed or will fail to reach a decision, or as to which the Labor Board determines that the adjustment Board has so failed, or is not using due diligence to consider it. It then provides that if no Adjust-

ment Board is organized under section 302 the Labor Board may, (1) on application of the carrier or organization of employees whose members are interested in the dispute, (2) on petition of not less than 100 unorganized employees, (3) on the Labor Board's own motion if of opinion that the dispute is likely substantially to interrupt commerce, receive, hear and decide any such dispute involving grievances, rules or working conditions, which is not decided under section 301, and which the Adjustment Board would be required to hear and decide under section 303. Sub-section (b) makes provision for the Labor Board, under like enumerated circumstances, to receive, hear and decide disputes concerning wages, the only distinction between wage disputes and disputes concerning grievances, rules and working conditions being, that for the latter there is the provision of section 302 for the Adjustment Board, which has no jurisdiction or function respecting wage disputes. But apart from the Adjustment Board provisions applicable to grievances, rules and working conditions only, the duties and functions of the Labor Board are the same respecting either class of disputes, and where, as here, no Adjustment Board has been created, the functions of the Labor Board do not differ as to wages and rules.

Section 301, by its terms, is applicable to "any dispute between the carrier and the employees." If the concluding sentence of the section, providing that in case the dispute is not decided in conference, it shall be referred "by the parties" thereto to the Board authorized to deal with the dispute, means that unless *both* parties agree so to refer it, the Board cannot in any event deal with the matter, Title III might as well not have been enacted; for if the right of the Board to act depended upon the joint submission of the parties to the dispute, it lay in the power of either party to block utterly any action by the Board, by simply refusing to join in the submission. Counsel for appellee do not contend that Title III is to that effect. In their brief they say:

"Under this section (307) an *ex parte* submission is provided for and the Board is authorized under such a submission to receive and decide disputes involving rules, working conditions, wages and grievances growing out of the administration thereof. * * * Even if the parties were in hopeless deadlock as to rules, working conditions and wages and grievances growing out thereof, under Section 307 such dispute could have been taken by either party to the Labor Board for determination without the consent of the other party."

This must be so else the manifest intent and purpose of Title III would fail. If therefore the dispute here involved is one which might in any event be cognizable by the Labor Board under Title III, it is not material whether it comes to it under section 301 or under any other or all the sections of the title.

This brings us to appellee's contention that there was here involved no dispute of which the Labor Board could take cognizance, or of which under Title III it had jurisdiction; and this indeed is the ground upon which mainly rests the asserted right of the court to interfere. It is maintained that the Transportation Act ended the railroad administration, and that thereupon jurisdiction over rules and working conditions was primarily with the carrier; that it might adopt such as it saw fit, and unless complaint was made by employees, and a dispute thus arose, the Labor Board had no right to interfere.

It has been above pointed out that for a considerable time prior to passage of the Transportation Act there was pending and undetermined serious dispute respecting wages and working conditions, and it requires no stretch of imagination to conclude that if upon the adoption of the Transportation Act the theretofore existing national agreements respecting rules and working conditions *ipso facto* ceased, the country would have been confronted by unprecedented danger of interruption to traffic. The condition was serious, and conferences between the highest authorities were in progress up to the very time the Transportation Act was adopted. Immediately upon the organization of the Labor Board it seems that as if by common consent the undetermined disputes were by it taken up and the hearings proceeded. Appellee was one of the parties thereto. Such seemed to be the imminence of the situation that it was deemed best to divide the controversy into two branches, and Decision No. 2 recites that it is rendered "upon that portion of this dispute which covers wages and does not deal with working conditions." Verity must be accorded to the finding of the Labor Board in this decision, that the dispute as coming to it involved not only wages, but also rules and working conditions, some of which materially affect wages, and that because of the time required for investigation of all the questions, and the practicability of an early decision of the wage question "it has been necessary,—and both parties to the controversy have indicated it to be their judgment and wish, that the Board should separate the questions involving rules and working conditions from the

wage questions." This indicates clearly that the whole subject was then regarded as before the Board, to be dealt with by it.

The Transportation Act changed the law, but it did not change the fact of the pendency of the serious dispute respecting wages and working conditions. The fact that the dispute existed long before the Board was created made it none the less a dispute cognizable by the Board if continuing to exist after the Board began to function. It is thus apparent that at the very outset, this dispute as to rules and working conditions was before the Board, and was so treated by both parties to the dispute, including appellee. Under these circumstances it would be immaterial whether it got there by *ex parte* or joint submission, or on the initiative of the Board itself. Title III is broad and remedial, and no fine jurisdictional lines should be drawn to circumscribe its scope or by procedural technicalities to limit its application. Assuming the truth of the recitals of fact in Decision No. 2, if instead of dividing the controversy the Board had, at the hearing of the wage dispute, also heard the dispute concerning rules and working conditions and decided it with the other, it would scarcely have been contended that it had less jurisdiction to hear the one than it did to hear that which it in fact then heard and determined.

This will answer also appellee's contention that the Labor Board had no power to order (as in Decision No. 2) that existing rules and working conditions, until further order, remain as they then were under the national agreement. The whole subject matter being before it, it could make such temporary order concerning it as in its judgment the exigencies of the case required. There is also the further ground that wages and working conditions are closely interwoven, and the Board in fixing the wages in its Decision No. 2 predicated its findings thereon upon the basis of "the continuance in full force and effect all the rules, working conditions and agreements in force under the authority of the United States Railroad Administration." Thus the rules and working conditions entered into the wage, and it was proper for the Board to fix the wage with reference to their continuance till changed by agreement or otherwise.

But appellee insists that it did ultimately make an agreement with its employees respecting rules and working conditions, and that these were by it put into force, and no dispute concerning them has arisen, and that the Labor Board is therefore without jurisdiction. Decision No. 119 concern-

ing rules and working conditions did not assume to fix them, but called upon employers and employees of the several systems to confer together and agree so far as possible respecting them. If at the time Decision No. 119 was promulgated the dispute as to rules and working conditions was in fact pending before the Board, it was entirely proper for the Board to request the parties to confer, and, if possible to agree, without thereby losing its jurisdiction over the controversy. If, pursuant to the request, or perhaps even without request, they had gotten together and agreed, there would to that extent be no further dispute. But it is apparent from Decision No. 119 that included in the controversy over rules and working conditions, was the question as to who would represent the employees upon such conferences, the carriers contending that it should be only its individual employees, and certain of the employees contending, as for some time theretofore, organizations might represent them. It was doubtless as the result of such contention that in Decision No. 119 the Board announced in principle that organizations might be selected to represent the employees. Appellee in its bill alleges that, without waiving its contention that the Board had no jurisdiction over the matter, it undertook compliance with Decision No. 119 by holding an election of its employees, but that in the ballot it prepared it omitted provision for choosing an organization to represent them, and it provided for electing representatives regionally rather than for several crafts covering the entire system, and that with representatives chosen at this election it negotiated rules and working conditions which it put into force. As above stated, Federation No. 90, after vainly endeavoring to have the ballots make provision for voting for an organization as representative, conducted an election of employees and thereupon *ex parte* submitted to the Board as a dispute the question of whether the employees of a craft might designate an organization to represent them in negotiations, and whether the law had been complied with in the method pursued by appellee. Appellee answered, and the dispute was orally presented by both parties to the Board. Decision No. 218 points out that the contention was made, and not disputed, that a majority of the employees did not vote for the representatives with whom appellee conducted the negotiations, but that the Company maintained, since all had opportunity to vote, this made no difference. As pointed out, Decision No. 218 held that the Company election was void because it restricted the choice of representatives to natural persons and to actual

employees of the road, and it held the employees' election void for restricting the choice to an organization, and directed another election to be held, prescribing the form of ballot as stated.

It is urged for appellee that the matter of the election of representatives by the employees is wholly procedural and is something with which the Board is in no wise concerned, and its action in this regard was wholly beyond its jurisdiction. The force of the contention is not apparent. Title III confers on the Board important duties, and prescribes in Section 308 (4) that it "may make regulations necessary for the efficient execution of the functions vested in it by this title." This, alone, if indeed in the very nature of things it were not necessarily so, would empower the Board to make provision for determining whether those purporting to represent disputants before the Board do in fact so represent them. If it is claimed that a pending dispute has been adjusted between the parties to it, it is very essential that the body before whom the dispute is pending assure itself of the authority to so dispose of the controversy of those who purport to act for the parties. This is especially true where one side of the dispute is a body of individuals such as employees of a great carrier. If, in a controversy pending before a court, its discontinuance is asked because of a settlement between the parties, it is necessary that the court ascertain whether those purporting to represent the parties were in fact such representatives competent to make the agreement. If this is disputed, the court must pass upon that issue; and it is not material whether such an issue is called "procedural" or otherwise. It arises and must be decided. The same situation is presented to the Board where its continued jurisdiction over a pending controversy is denied on the ground of its having been settled between the parties. The representative capacity of the purported representatives was here directly challenged and constituted an issue or dispute which the Board had to decide, resulting in Decision No. 218 and its subsequent modification. It was eminently proper that the Board, either by general rule or otherwise, indicate how in its best judgment such representation should be manifested and the election conducted.

Whether the employees may, if they so choose, be represented by an organization as held by the Board, or whether they may be represented only by individuals who were employees of the same employer as contended by appellee, is not properly a question for a court. As abstract propositions

much may be said on either side. Title III in several instances recognizes representation of employees by organizations (Secs. 302, 303, 307 a and b, 309, 313), and that was largely the practice with many carriers before government control, and generally so during government control, the national agreements having been so negotiated. But in so far as it was for the Board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question, and the manner of its disposition, was for the Board, no question here arising as to the Board's good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee, it is not for the court to substitute its opinion for that of the Board in matters by law committed to the Board.

Decision No. 119 directed that the employees choose representatives to confer with the carriers, and Decision No. 218 directed the employees to hold an election. This suggests the thought that it is not for the employer to complain of Decision No. 218 directing the employees to hold this election. The directed participation of the employer was to enable it to know whether the election was fairly conducted, that all have opportunity to vote, and the ballots cast be truly counted. True it is, that if the employees select as their representatives System Federation No. 90 or some other organization, the carrier may decline to confer. The carrier might also decline to confer with individual representatives for any reason, sound or capricious,—the color of their hair or their eyes, or the cut of their clothes; or it might in the first instance give ultimatum to the employees that it would not confer with representatives who had not been in their employ for ten years or impose any other conditions, reasonable or not. This is merely to state that when representatives are selected either of the parties may, for any cause or no cause at all, decline to enter into conference with them. As applied to this situation it would simply mean that the Board had failed in its effort to dispose of a pending dispute by effecting an agreement between the parties interested, with the result that the dispute still remains with the Board just as if it had not undertaken to bring the parties to a mutual understanding.

In this connection it may be pointed out that the question whether the employees have in fact consented to the rules and working conditions which appellee announced is still pending before the Board. In its last order, made on petition of appellee to set aside Decision No. 218, the Board granted

the petitioner's request to present its views on certain questions, among them as to how the representative capacity of those representing unorganized employees shall be ascertained, and of the adoption or ratification of appellee's rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class. An early date for that hearing was set, but it does not appear that it has taken place, the next action shown of record being the filing of the bill herein.

Appellee contends that wholly regardless of any agreement with its employees, upon the termination of government control it had the right on its own motion to prescribe rules and working conditions, which would be effective until and unless changed pursuant to the provisions of Title III, and that the Board was without power over those rules and working conditions which appellee did adopt unless on complaint as to them and hearing on such complaint. What has been said on the subject of the dispute pending before the Board as to rules and working conditions, applies as well to this contention. It seems the hearing on the pending dispute began before the Board right after its organization. If after this appellee could by promulgating on its own motion new rules and working conditions oust the Board of its right to proceed further with the pending dispute, Title III would be without practical effect. The carrier could in any pending dispute, whether on rules or wages, put forth its own rules or wage scale, and straightway the authority of the Board over the dispute pending before it would be gone. The undertaking of the Board to have the parties agree did not withdraw from it the dispute, and neither did the notice of May 3, 1920, of the chairman of the Association of Railway Executives to the labor organizations that that Association had made recommendation to the member roads (which included appellee) that negotiations respecting continuance of the national agreements and interpretations thereof be handled by negotiation between the management and employees of each road.

Under the foregoing views it follows that the Labor Board did not as to the matters involved transcend its power and functions under Title III, and that relief under the bill should have been denied. It will not be necessary to consider the contention, earnestly pressed for appellant, that the action is in effect one against the United States, which has not given its consent thereto, and must for that reason be dismissed.

The decree of the District Court is reversed with direction to dismiss the bill.

And afterwards, on the same day, to wit: On the twentieth day of July, 1922, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Thursday, July 20, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.
Hon. George T. Page, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Francis E. Baker, Circuit Judge.
Hon. Samuel Alschuler, Circuit Judge.
Hon. Evan A. Evans, Circuit Judge.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins, as the members of the United States Railroad Labor Board

3139 *vs.*
The Pennsylvania Railroad Company.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

This cause came on to be heard on the transcript of the record from the District Court of the United States for the Northern District of Illinois; Eastern Division, and was argued by counsel.

On consideration whereof: It is now here ordered, adjudged and decreed by this court that the decree of the said District Court in this cause be, and the same is hereby reversed; and that this cause be, and the same is hereby remanded to the said District Court with direction to dismiss the bill.

And afterwards, to wit: On the eighth day of August, 1922, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Petition For Appeal which said Petition For Appeal is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins, *Appellants*,
vs.
The Pennsylvania Railroad Company, *Appellee.* } Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

PETITION FOR APPEAL.

The Pennsylvania Railroad Company feeling itself aggrieved by the final order of the United States Circuit Court of Appeals for the Seventh Circuit, made and entered herein on July 20, 1922, reversing the final decree of the District Court of the United States for the Northern District of Illinois, Eastern Division, made and entered in the said District Court on May 4, 1922, and directing that the bill therein be dismissed, by its counsel, prays an appeal from said final order so entered by said United States Circuit Court of Appeals to the Supreme Court of the United States.

The particulars wherein the appellee considers the final

order erroneous are set forth in the assignment of errors on file, to which reference is made.

The Pennsylvania Railroad Company prays that a transcript of the record, proceedings and papers on which the final order was made and entered, duly authenticated, may be transmitted forthwith to the Supreme Court of the United States.

F. J. LOESCH,
T. J. SCOFIELD,
C. F. LOESCH,

Solicitors for the Pennsylvania Railroad Company.

C. B. HEISERMAN,

*General Counsel,
The Pennsylvania Railroad Company.*

E. H. SENEFF,

*General Solicitor,
The Pennsylvania Railroad Company.*

Endorsed: Filed Aug. 8, 1922. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to wit: On the eighth day of August, 1922, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Assignment of Errors, which said Assignment of Errors is in the words and figures following, to wit:

IN THE UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 3139.

October Term, 1921, April Session, 1922.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins,
Appellants,
vs.
The Pennsylvania Railroad Company,
Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

ASSIGNMENT OF ERRORS.

The Pennsylvania Railroad Company, appellee, now comes by its counsel, and in connection with its petition for appeal, files the following assignment of errors, on which it will rely on its appeal to the Supreme Court of the United States from the final order of said United States Circuit Court of Appeals reversing the decree of the District Court of the United States for the Northern District of Illinois, Eastern Division in the above entitled cause and directing said Court to dismiss the bill therein.

The Circuit Court of Appeals erred:

1. In holding and deciding that the relief prayed for in the bill should have been denied and in reversing the decree of the District Court and directing that the bill be dismissed.
2. In deciding and holding that the constitutionality of Title III of the Transportation Act of 1920 is not here involved, and in refusing to pass upon the constitutional questions raised by the bill and involved herein.

3. In refusing to pass upon the constitutionality of Title III, and each section thereof, under which title the Labor Board asserts a right and has assumed power to declare contracts and agreements entered into between the Pennsylvania Railroad Company and its employes void, and power to direct that a second election be held to select conferees for conferences to agree upon contracts and agreements in lieu of those so as aforesaid declared void in violation of the Constitution of the United States and in violation of the 5th, 6th, and 7th Amendments to said Constitution.

4. In holding and deciding that "there is not here involved any proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions" * * * "and when this stage is reached and one or both of the parties refuse to obey the Board's decision it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties," thereby holding that the question of the constitutionality of Title III cannot be interposed excepting as to decisions of the Board which concern wages and working conditions.

5. In deciding and holding that the protection of the Constitution, if applicable, cannot attach herein to protect the carrier from an irreparable injury to its property, through the publication of appellant, which decision said Board was without authority to make.

6. In holding, deciding and adjudging that the Labor Board is without power to intervene in any way in the proceedings contemplated by said Section 301 preceding a submission to it jointly by the parties.

7. In not holding, deciding and adjudging that the dispute here involved arises wholly under the provisions of Section 301 of the Transportation Act of 1920.

8. In deciding and holding that the Labor Board did not transcend its power and functions under Title III in Decisions 119 and 218 as to the selection of conferees for conference, as to eligibility to election as conferees, as to how conferees may be selected and as to whether officers of labor unions as such, may represent employes in such conferences instead of individual employes elected as representatives by the employes of the carrier, both union and nonunion.

9. In not holding, deciding and adjudging that the United States Railroad Labor Board was without power to promul-

gate and prescribe principles 5 and 15, or either of them, attached to and made a part of Decision 119.

10. In deciding and holding that whether employes may be represented in conferences contemplated by Section 301 by an organization, or by individuals, who are employes of the same employer, is wholly within the discretion of the Board and that an exercise of such discretion cannot be reviewed by the Courts.

11. In deciding and holding that the Labor Board acquired jurisdiction to decide the *ex parte* submissions which give rise to Decision 218 and in holding that the decision thereon was in the discretion of the Labor Board and not subject to review in the courts.

12. In not holding, deciding and adjudging that the appointment, method of electing, or eligibility for conferees, under Section 301, are not functions delegated to the United States Railroad Labor Board and that the Board was without power to make the regulations it assumed to make and set out in its decision No. 218, on pages 8, 9 and 10, deciding who are eligible to vote for conferees, requiring conferences to be held and prescribing the contents of ballots to be used.

13. In not holding, deciding and adjudging that the selection of conferees for conferences, between a carrier and its employes, under Section 301, is for the determination of the interested carrier and employes alone, unless they cannot agree and thereupon jointly submit such dispute to the Board for decision and determination under the provisions of said Section 301.

14. In not holding, deciding and adjudging that the United States Railroad Labor Board was without jurisdiction to determine as it assumed to be in decision 218, that the election for employe conferees for conferences as to rules and working conditions on the Pennsylvania System was illegal, and that the rules and working agreements negotiated by representatives so elected are void and of no effect, and to order another election held, on the *ex parte* submission by the Railway Employes Department of the American Federation of Labor of the questions which gave rise to said Decision 218, which questions are set out in said decision and are as follows:

(1) "Has a majority of the employes of any craft on the Pennsylvania System the right to designate an organization to represent said employes in negotiating an agreement with the carrier covering rules and working conditions?"

(2) "Has a majority of the employes of such craft the right to be represented in such negotiations by anyone other than an employe of said carrier?"

(3) "Has the carrier complied with the law in the method pursued to it to ascertain who are the representatives of the shop employes with whom it shall negotiate rules?"

15. In not deciding, hold and adjudging that the United States Railroad Labor Board and the members thereof are without power to determine whether the selection of conferees under Decision 119 complied with the law.

16. In holding and deciding that jurisdiction over the subject of rules and working conditions was conferred upon the Board by the transition from Federal to Company control and that the jurisdiction so conferred, authorized it to hear and determine a dispute between the carrier and its employes subsequently arising under Section 301, without joint submission of the dispute by the respective parties thereto to the Labor Board for its decision and determination.

17. The Court erred in holding and deciding that the transition from federal to company control under the Transportation Act of 1920 conferred jurisdiction over pending disputes as to wages and working conditions upon the Board without regard to the provisions of Section 301 and 307 thereof in declaring that if * * * "the dispute here involved is one which might in any event be cognizable by the Labor Board under Title III it is not material whether it comes to it under Section 301, or under any other or all Sections of the Title."

18. The Court erred in deciding and holding that if the dispute here involved is one which might in any event be cognizable by the Labor Board under Title III it is not material whether it comes to it under Section 301, or under any other, or all the sections of the title, inasmuch as under Title III the question of conferees for conferences as to disputes between carriers and employes cannot come to the Labor Board for determination under any other section than Section 301, and then only in accordance with the plain language of the section which requires joint submission. Unless the Labor Board so acquires jurisdiction it does not have jurisdiction.

19. In not holding, deciding and adjudging that the United States Railroad Labor Board is without authority to make publication of the carrier under Section 313 of the Transportation Act, for refusing to comply with the Board's decision No. 218.

Wherefore, the Pennsylvania Railroad Company prays that the said order of the Circuit Court of Appeals for the Seventh District entered on July 20th, 1922, in the above entitled suit, be reversed, annulled and set aside and the injunction entered in the United States District Court, Northern District of Illinois, Eastern Division, on May 4th, 1922, be made permanent, and for such other and further order as may be appropriate.

THE PENNSYLVANIA RAILROAD COMPANY
by F. J. LOESCH,
C. F. LEOSCH.
T J SCOFIELD

Endorsed: Filed August 8, 1922. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to wit: On the eighth day of August, 1922, in the October term last aforesaid, the following further proceedings were had and entered of record, to wit:

Tuesday, August 8, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Samuel Alschuler, Circuit Judge.

No. 3139.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins,

Appellants,

vs.

The Pennsylvania Railroad Company,

Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

In the above entitled cause the Pennsylvania Railroad Company having made and filed its petition praying for an appeal

to the Supreme Court of the United States from the final order of the United States Circuit Court of Appeals for the Seventh Circuit made and entered on July 20th, 1922, and having also made and filed an assignment of errors, and having in all respects conformed to the statute and rules of Court in such case made and provided:

It is ordered and decreed that the appeal be and the same is hereby allowed as prayed for and made returnable to the October term of the Supreme Court of the United States, and the Clerk is directed to transmit forthwith a properly authenticated transcript of the record, proceedings and papers on which said order here appealed from was made and entered to the Supreme Court of the United States.

It is further ordered that the bond of appeal in the sum of five hundred dollars (\$500.00) and condition as required by law be filed within twenty days from the date hereof.

And afterwards, on the same day to wit: On the eighth day of August, 1922, in the October term last aforesaid, there was filed in the office of the Clerk of this Court a certain Appeal Bond which said Appeal Bond is in the words and figures following, to wit:

IN THE
UNITED STATES CIRCUIT COURT OF APPEALS
For the Seventh Circuit.

No. 3139.

October Term 1921, April Session, 1922.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins,

Appellants,

vs.

The Pennsylvania Railroad Company,

Appellee.

Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Know all men by these presents that we, The Pennsylvania Railroad Company as principal, and the United States Fidelity and Guaranty Company, a corporation, as surety are held and firmly bound unto United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, in the full and just sum of five hundred dollars (\$500.00) to be paid to the said United States Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, their attorneys, executors, administrators, or assigns; to which payment well and truly to be made we bind ourselves, our successors and assigns, jointly and severally, firmly by these presents. Sealed with our seals and dated this 8th day of August, in the year of our Lord, 1922.

Whereas lately at a session of the United States Circuit Court of Appeals for the Seventh Circuit in a suit pending in said Court between the Pennsylvania Railroad Company, a

corporation as appellee and United States Railroad Labor Board and the members thereof as appellants, on appeal from a decree entered in the United States District Court, Northern District of Illinois; Eastern Division an order was entered reversing the decree of said District Court and directing the said Court to dismiss the bill and the said The Pennsylvania Railroad Company having obtained from said United States Circuit Court of Appeals an order allowing an appeal to the United States Supreme Court, and having filed a copy thereof in the Clerk's office of said Court, to reverse the said order of the said United States Circuit Court of Appeals, and a citation directed to the said United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, citing and admonishing them to be and appear in the Supreme Court of the United States to be holden at Washington, in the District of Columbia, on the first Monday of October, 1922.

Now, the condition of the above obligation is such, that if the said The Pennsylvania Railroad Company shall prosecute its said appeal to effect and shall answer all damages and costs that may be awarded against it if it fails to make its plea good then the above obligation to be void, otherwise, to remain in full force and virtue.

THE PENNSYLVANIA RAILROAD COMPANY,
By J. G. RODGERS,
Vice President.
(Seal) UNITED STATES FIDELITY AND GUARANTY COMPANY,
by ALPHONSUS D. SMITH,
Attorney in Fact.

Sealed and delivered in the presence of

Approved.

AL SCHULER,
Judge.

Endorsed: Filed August 8, 1922. Edward M. Holloway,
Clerk.

And afterwards, on the same day, to wit: On the eighth day of August, 1922, in the October term last aforesaid, the following further proceedings were had and entered of record:

Tuesday, August 8, 1922.

Court met pursuant to adjournment.

Present:

Hon. Francis E. Baker, Circuit Judge, presiding.
Hon. Samuel Alschuler, Circuit Judge.
Edward M. Holloway, Clerk.

Before:

Hon. Samuel Alschuler, Circuit Judge.

No. 3139.

United States Railroad Labor
Board, R. M. Barton, G. W. W.
Hanger, Ben W. Hooper, A. O.
Wharton, W. L. McMenimen,
Horace Baker, J. H. Elliott, Al-
bert Phillips and Samuel Hig-
gins,

Appellants,

vs.

The Pennsylvania Railroad Com-
pany,

Appellee.

Appeal from the District Court
of the United States for the
Northern District of Illinois,
Eastern Division.

Now comes Pennsylvania Railroad Company, appellee in the above entitled cause, by its attorneys, and files herein its appeal bond in the penal sum of Five Hundred (\$500) Dollars, and said bond is hereby approved and it is hereby ordered that said bond operate as a supersedeas until the final disposition of said appeal.

UNITED STATES CIRCUIT COURT OF APPEALS

For the Seventh Circuit.

I, Edward M. Holloway, Clerk of the United States Circuit Court of Appeals for the Seventh Circuit, do hereby certify that the foregoing pages, numbered from 161 to 191, inclusive, contain a true copy of the proceedings had and papers filed (except the briefs of counsel in the following entitled cause:

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins, as the members of the United States Railroad Labor Board,

vs.

The Pennsylvania Railroad Company,

No. 3139, October Term, 1921, as the same remains upon the files and records of the United States Circuit Court of Appeals, for the Seventh Circuit.

In testimony whereof I hereunto subscribe my name and affix the seal of said United States Circuit Court of Appeals for the Seventh Circuit, at the City of Chicago, this sixteenth day of August, A. D. 1922.

(Seal)

EDWARD M. HOLLOWAY,
Clerk of the United States Circuit Court of Appeals for the Seventh Circuit.

In the United States Circuit Court of Appeals for the Seventh Circuit,
October Term, 1921, April Session, 1922.

No. 3139.

UNITED STATES RAILROAD LABOR BOARD, R. M. BARTON, G. W. W.
Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen,
Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins,
Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY, Appellee.

Appeal from the District Court of the United States for the Northern
District of Illinois, Eastern Division.

Citation on Appeal.

UNITED STATES OF AMERICA, *ss.*:

To United States Railroad Labor Board, R. M. Barton, G. W. W.
Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen,
Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins:

You are hereby notified that in a certain cause in equity in the
United States Circuit Court of Appeals for the Seventh Circuit
wherein The Pennsylvania Railroad Company is appellee and the
United States Railroad Labor Board and R. M. Barton, G. W. W.
Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace
Baker, J. H. Elliott, Albert Phillips and Samuel Higgins, as mem-
bers of the United States Railroad Labor Board, are appellants, an ap-
peal has been allowed to The Pennsylvania Railroad Company to the
Supreme Court of the United States.

You are hereby cited and admonished to be and appear in — Su-
preme Court of the United States in the City of Washington, District
of Columbia, thirty days after the date of this citation, to show
cause, if any there be, why the final order or decree appealed from
should not be corrected, and why speedy justice should not be done
to the parties in that behalf.

Witness the Honorable Samuel Alschuler, holding the United
States Circuit Court of Appeals for the Seventh Circuit this 9th day
of August, A. D. 1922.

SAMUEL ALSCHULER,
Judge.

Service of the within citation and the receipt of a copy thereof are
hereby acknowledged this 11th day of August, A. D. 1922.

JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

[Endorsed:] No. 3139. United States Circuit Court of Appeals, Seventh Circuit. U. S. Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins, Appellants, vs. The Pennsylvania Railroad Company Appellee. Citation on appeal and service thereof on Solicitor Genl. U. S. Filed Aug. 14, 1922. Edward M. Holloway, Clerk. Loesch, Scofield, Loesch & Richards, Attorneys at Law, 1540 Otis Bldg., 10 South La Salle St., Chicago, Illinois.

Endorsed on cover: File No. 29,135. U. S. Circuit Court Appeals, 7th Circuit. Term No. 585. The Pennsylvania Railroad Company, appellant, vs. United States Railroad Labor Board et al. Filed September 9th, 1922. File No. 29,135.

(7717)

UNITED STATES OF AMERICA, ss:

[Seal of the Supreme Court of the United States.]

the President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Seventh Circuit, Greeting:

Being informed that there is now pending before you a suit in which United States Railroad Labor Board, R. M. Barton, G. W. W. Janger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips and Samuel Higgins are appellants, and The Pennsylvania Railroad Company is appellee, No. 139, which suit was removed into the said Circuit Court of Appeals by virtue of an appeal from the District Court of the United States for the Northern District of Illinois, and we, being willing for certain reasons that the said cause and the record and proceedings herein should be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States, do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable William H. Taft, Chief Justice of the United States, the twenty-eighth day of December, in the year of our Lord one thousand nine hundred and twenty-two.

WM. R. STANSBURY,
Clerk of the Supreme Court of the United States.

[Endorsed:] File No. 29135. Supreme Court of the United States, October Term, 1922. No. 585. The Pennsylvania Railroad Company vs. United States Railroad Labor Board et al. Filed Jan. 1, 1923. Edward M. Holloway, Clerk. Writ of Certiorari.

UNITED STATES OF AMERICA,
Seventh Circuit, ss:

In obedience to the command of the foregoing writ of certiorari and in pursuance of the stipulation of the parties, a full, true and complete copy of which is hereto attached, I hereby certify that the transcript of record furnished with the application for a writ of certiorari in the case of United States Railroad Labor Board, et al., appellants, vs. The Pennsylvania Railroad Company, appellee, is a full, true and complete transcript of the record upon which said cause was heard in the United States Circuit Court of Appeals for the Seventh Circuit, together with all proceedings in said court.

In testimony whereof, I hereunto subscribe my name and affix the seal of the United States Circuit Court of Appeals for the Seventh

Circuit, at the City of Chicago, this second day of January, A. D. 1923.

[Seal of the United States Circuit Court of Appeals, Seventh Circuit.]

*Clerk of the United States Circuit Court
of Appeals for the Seventh Circuit.*

In the United States Circuit Court of Appeals for the Seventh Circuit,

UNITED STATES RAILROAD LABOR BOARD, R. M. BARTON, G. W. W. Hanger, Ben W. Hooper, O. O. Wharton, W. L. McMeniman, Horace Baker, J. H. Elliott, Albert Phillips, and Samuel Higgins, Appellants,

vs.

THE PENNSYLVANIA RAILROAD COMPANY.

On Appeal from the District Court of the United States for the Northern District of Illinois, Eastern Division.

Stipulation.

It is stipulated by and between the parties to the above entitled cause that the transcript of record heretofore filed in the Clerk's Office of the Supreme Court of the United States constituting the record on appeal in the case of The Pennsylvania Railroad Company, appellant, vs. United States Labor Board, et al., numbered 585 on the October Term 1922 calendar of said Supreme Court, shall constitute and be the transcript of record on the return by the Judges of the United States Circuit Court of Appeals for the Seventh Circuit to the writ of certiorari issued out of said Supreme Court on the twenty-eighth day of December, nineteen hundred and twenty-two.

It is further stipulated that a duly certified copy of this stipulation appended to said writ of certiorari and filed with the Clerk of said Supreme Court of the United States in said case numbered 585 as above, shall constitute a full and complete return to said writ of certiorari.

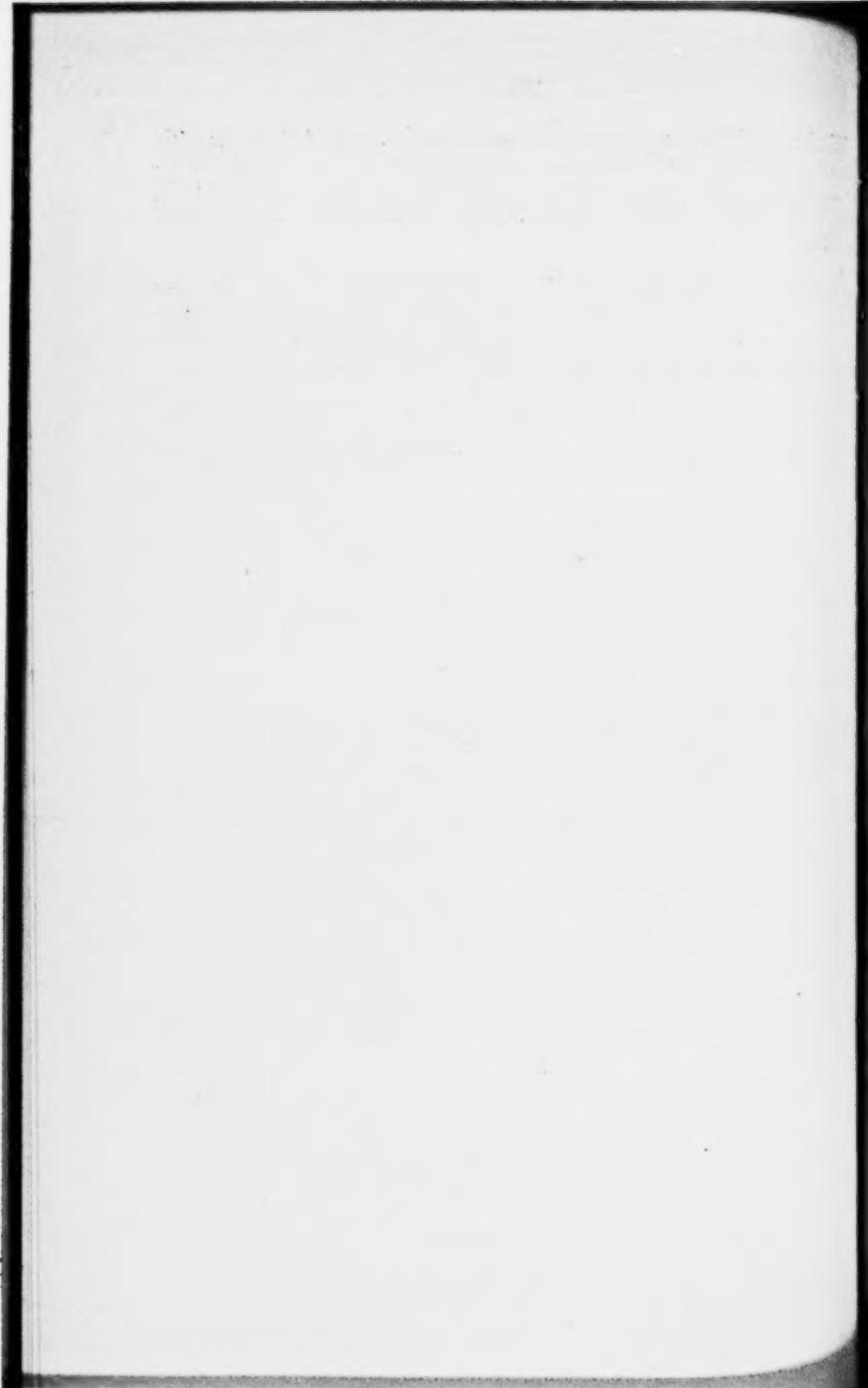
LOESCH, SCOFIELD, LOESCH &
RICHARDS,
T. J. SCOFIELD,
Attorney for The Pennsylvania Railroad Company.
JAMES M. BECK,
Solicitor General;
BLACKBURN ESTERLINE,
Assistant to the Solicitor General,
For the United States Railroad Labor Board et al.

December 29, 1922.

[Endorsed:] In the United States Circuit Court of Appeals, 7th Circuit. United States Railroad Labor Board et al. vs. The Pennsylvania Railroad Co. Stipulation. Filed Jan. 2, 1923. Edward M. Holloway, Clerk. McKenney & Flannery, Washington, D. C., Hibbs Building.

[Endorsed:] File No. 29135. Supreme Court U. S., October Term, 1922. Term No. 585. The Pennsylvania Railroad Company, Petitioner, vs. United States Railroad Labor Board et al. Writ of certiorari and return. Filed January 8th, 1923.

(8236)



FILED

OCT 23 1922

W. R. STANIS

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 585

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,
vs.

UNITED STATES RAILROAD LABOR BOARD, R. M.
BARTON, G. W. W. HANGER, BEN W. HOOPER,
A. O. WHARTON, W. L. McMENIMEN, HORACE
BAKER, J. H. ELLIOTT, ALBERT PHILLIPS,
SAMUEL HIGGINS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT ON BEHALF OF THE PENNSYLVANIA RAILROAD
COMPANY IN SUPPORT OF ITS PETITION FOR A WRIT OF
CERTIORARI HEREIN.

FRANK J. LOESCH,
TIMOTHY J. SCOFIELD,
CHARLES F. LOESCH,
ROBERT W. RICHARDS,
Attorneys for Petitioner.

C. B. HEISERMAN,
E. H. SENEFF,
Of Counsel.



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Defendants' Exhibit 6:

Order of Labor Board on petition of The Pennsylvania Railroad Company requesting vacation of Decision No. 218...

Two questions raised by petition:

- (1) Extension of national agreements.
- (2) Request to vacate Decision 218 and to decide certain propositions as contended for by carrier.....

Points in petitioner's application to vacate Decision 218, as stated by the board..... 118-121

- 1—The protest of the carrier against the extension of the national agreements.
- 2—The right of the board to adopt the principles set out in Decision No. 119 and in other decisions, for the guidance of carriers and employees, is questioned.
- 3—An attack or criticism is made on the statement in the decision that "there is no question of the closed or open shop involved in this dispute and no other real matter of principle. The question involved is merely one of procedure."
- 4—The carrier announced it to be its intention and purpose to follow its own plan to decide upon the qualifications of the employees who were to vote, and avers that it has the right to prescribe and limit the qualifications of employees as to their voting by eliminating those not in actual service at the time, although they may be still on its rolls as employees, but simply laid off or furloughed at the time of election.

- 5—The carrier states in its petition that it has been its policy to establish and maintain employee representation since the termination of federal control.
- 6—Section 6 of the petition contains a somewhat vague statement to the effect that the employees' representatives have recently signified their approval of the agreements negotiated with carrier.
- 7—The carrier states that the agreements it has entered into with employees of the shop crafts are in full force and effect, that the parties have acquired mutual rights thereunder, and that their abrogation by this board will work a great injury to both carrier and employees.
- 8—The carrier suggests that the employees who are not parties to the alleged contracts and who do not want to be bound by them may invoke the aid of the board.

As to the legal right of the carrier to establish rules and working conditions the board says.....

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"It is the duty of the board to prescribe what are fair, just and reasonable rules and working conditions for the parties without regard to their strict legal rights, and that if each party is allowed to insist upon its strict legal rights, as defined by the decisions of the Supreme Court of the United States prior to the enactment of the Transportation Act, it would be impossible for them to reach agreements, except the agreement to disagree and separate and thus, in effect, demoralize the transportation system of the country."

Order of the board on the petition to vacate Decision 218....

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"It is the order of the Labor Board that the carrier's request for an oral hearing of its petition shall be granted for the purpose of permitting the carrier to present its views on the following matters:

- 1—The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed, or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements on rules and working conditions.
- 2—The question of how the representative capacity of the spokesmen of unorganized employees shall be ascertained. —

3—The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class.

Said hearing is set for 10 A. M., Monday, September 26, 1921.

The board declines to grant a hearing upon the other questions raised in carrier's petition, for reasons hereinbefore set out."

Plaintiff's Exhibit No. 1:

Decision 224

Order of Railroad Labor Board reinstating two section foremen discharged from the service of the Butler County Railroad Company.....

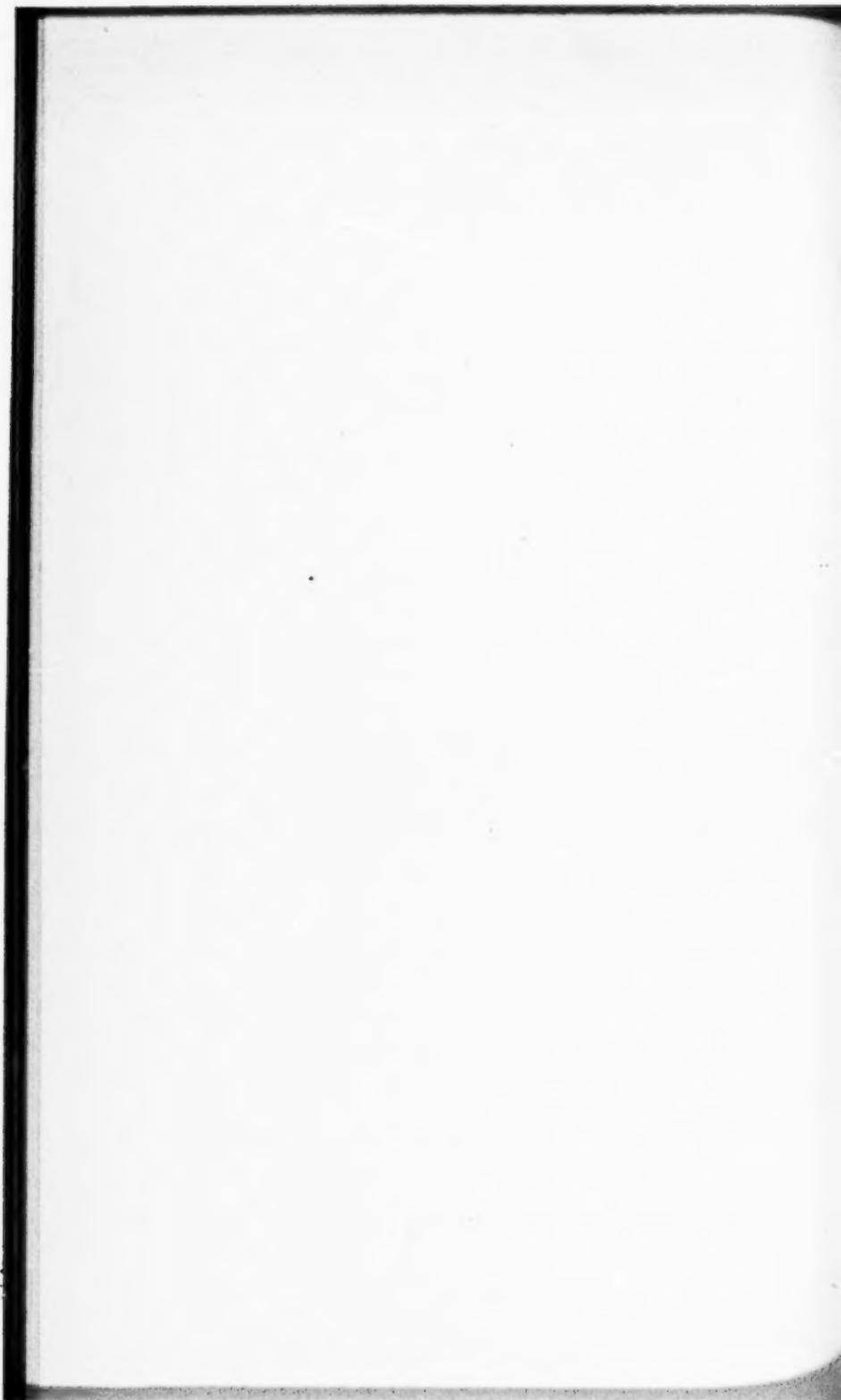
Foremen were discharged because they were members of a union of trackmen to which union the men working under them belonged. Such association was deemed incompatible with their position as foremen representing the Company in relations with the men, and for that reason they were retired.....

The board concedes the freedom of carriers to control their property and the right to prescribe rules and working conditions under decisions of the United States Supreme Court and quotes to that effect from Hitchman Coal & Coke Company v. Mitchell et al. 245 U. S. 229.....

Ignoring such decisions of the Supreme Court the board orders the Butler County Railroad Company to reinstate said discharged section foremen.....

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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 585

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,
vs.

UNITED STATES RAILROAD LABOR BOARD, R. M.
BARTON, G. W. W. HANGER, BEN W. HOOPER,
A. O. WHARTON, W. L. McMENIMEN, HORACE
BAKER, J. H. ELLIOTT, ALBERT PHILLIPS,
SAMUEL HIGGINS,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

ARGUMENT ON BEHALF OF THE PENNSYLVANIA RAILROAD COMPANY IN SUPPORT OF ITS PETITION FOR A WRIT OF CERTIORARI HEREIN.

STATEMENT.

The bill herein denies the right of the Labor Board to dictate to the carrier as to matters of railway procedure

and management. It recognizes a duty under Title III of the Transportation Act of 1920 to meet representatives of its employees, both union and nonunion, in conference. It denies power in the board to compel a carrier to confer with officers of labor unions and federated systems of labor unions, as such, members of which constitute a part of its employees. It denies power in the board to confer upon a federated system of labor unions the privilege of acting towards lawful objects through representatives of its own choice, whether such representatives are employees of the carrier or not, and to compel the carrier to agree thereto. It denies the power of the board to determine that the majority of any craft or class of employees shall have the right to select an organization to represent them in conference and impose such representation upon the carrier. It contends that if a conference is agreed upon, its employees, both union and nonunion, are entitled to representation, but insists that representation contemplated by the act is individual representation selected from employees in the carrier's service. It denies that its employees may be represented in such conference by organizations, as such. It insists that organization representation is not such representation as the act contemplates. It insists that the Labor Board has no jurisdiction over the selection of representatives for conferences, or over principles to control such conferences. It insists that the board cannot function until the subject matter of dispute reaches it as provided in said act.

By its Decision No. 119 (Pr. Rec., 69-87), filed April 14, 1921, the Labor Board assumed to call upon the *officers and system organizations of employees of the carrier, parties to the decision*, to designate and authorize representatives to confer and decide so much of the dis-

pute relating to rules and working conditions as it might be possible for them to decide and *prescribed 16 principles to which it required such conference to conform.*

Principle No. 5 declared the right of a lawful organization to act towards lawful objects through representatives of its own choice, *whether such representatives were employees of the carrier or not and declared that the carrier must agree to such principle.*

Principle No. 15 declared that the majority of any craft or class of employees might designate *some organization* to represent the members of such craft or class.

The Labor Board was without power, express or implied, to require conferences to be held between carrier and employee, but plaintiff, nevertheless, endeavored to comply with said decision so far as it consistently could. It refused, however, to accept as binding upon it said Principle 5, which authorized its *union employees* to act through representatives who were not *in its employ*, or said Principle No. 15, which authorized the majority of any craft or class of its employees to designate *an organization to represent them.* The carrier contended that Section 301 of said Title III contemplates as *employee representatives* persons in its employ, *whether union or nonunion, and individual representation, not organization representation.*

Conforming to the request of the Labor Board in Decision 119, The Pennsylvania Railroad Company prepared and furnished each of its employees, both *union* and *nonunion*, ballots upon which to write the name of *union and nonunion employees* to represent them in conferences with the carrier to negotiate rules and working conditions. Against this ballot the officers of the various unions represented in its shop crafts protested claiming that under the rules of the unions the general chairmen

of such unions were the authorized representatives of their members. The carrier refused to recognize them as such. Thereupon said union officers prepared and furnished the union membership in the employ of the Pennsylvania System a ballot for System Federation No. 90 to represent them in the proposed conference, directed them not to vote for individual representatives, and by circular ordered the members of such unions not to vote the ballot furnished by the carrier. Thus in effect two elections were held. The Pennsylvania Railroad Company recognized the election at which all its employees, union and nonunion, alike, were respectively provided with ballots and requested to vote for individual representatives, either union or nonunion, as they might elect. With the representatives so elected the carrier conferred. Together in conference they negotiated to a conclusion agreements covering rules and working conditions, and thereupon such agreements were reduced to writing and were thereafter conformed to by both union and nonunion employees.

Thereupon System Federation No. 90, by B. M. Jewell, President of the Railway Employees' Department of the American Federation of Labor made an *ex parte* submission to the Labor Board representing that in the election to select representatives the carrier had failed to conform to Principles 5 and 15, attached to Decision 119, and inquiring whether or not a majority of the employees of any craft on the Pennsylvania System had the right to designate an organization to represent them in negotiating agreements with the carrier covering rules and working conditions, and whether or not a majority of the employees of such craft had the right to be represented in such negotiations by anyone other than an employee of

said carrier, and whether or not the carrier had complied with the law in selecting representatives to represent its shop craft employees in negotiating rules and working conditions. The board assumed jurisdiction of said *ex parte* submission and the carrier filed an answer.

In Decision No. 218 (Pr. Rec., 92-102) the board announced its holding on said *ex parte* submission. The decision declared that *under the authority of the Transportation Act* both elections on the Pennsylvania System were illegal. *That the rules negotiated thereunder were void and of no effect.* The decision thereupon ordered a second election for representatives and prescribed the form of ballot to be used and dictated the qualification for voting. The carrier petitioned the board to vacate said decision but, after a hearing, the board refused to do so. (Pr. Rec., 106.)

The carrier contended that the board was without power to declare said election, and the contracts entered into between it and the representatives selected at said election, void, and that the board was without power to order carrier and employees to hold a second election as ordered in said Decision No. 218. Therefore the carrier declined to be a party to a second election as ordered by said decision or to treat said contracts so entered into with its employees as void and of no effect. Thereupon, under Section 313 of Title III of said act, the board determined that the carrier had violated its Decision No. 218, and ordered publication of the Pennsylvania Railroad for refusing to follow said unauthorized decision. The carrier then filed its bill in the United States District Court praying that the Labor Board and its members, among other things, be enjoined from making such publication. The defendants moved to dismiss said bill and filed a so-called answer concerning which Judge

Page said in his opinion (Pr. Rec., 135) that the so-called answer filed by the defendants is nothing more than a statement of grounds urged for dismissal, with the orders of the Labor Board and its decisions referred to in the bill, attached as exhibits.

The power assumed by the board is shown in its decisions, filed as exhibits, authority for which, if there be such authority, must arise under the provisions of said Title III.

The hearing was upon bill, motions to dismiss, and exhibits. The motions to dismiss were overruled.

A construction of Sections 301, 307, 308 and 313 of Title III of the Transportation Act of 1920 was essential to a decision both on the question of power and on the constitutionality of the act.

Judge Page construed said sections and held that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties, that the appointment or method of election of conferees under Section 301 was not one of the functions delegated to the board (Pr. Rec., 139), and that the board was without power or authority to make the regulations provided for in its Decision No. 218 on pages 8, 9 and 10. (Pr. Rec., 98-102.)

A perpetual injunction was entered restraining the Labor Board and its members

“(1) From assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act unless and until there has been a joint submission of a dispute by the carrier and the employees which has been the subject matter of conference between them.

(2) Upon such joint submission the board may proceed to hear and determine disputes only under

and in accordance with the general provisions of Title III of the Transportation Act.

(3) From making publication of any matter based upon action taken by the board not in harmony with Item 1 hereof." (Pr. Rec., 146-7.)

From the decree entered in the District Court the defendants perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit sitting at Chicago, Illinois. Thirteen errors were assigned on which the appeal was heard in the Circuit Court of Appeals. (Pr. Rec., 149-152.)

Under the opinion in the Circuit Court of Appeals (Pr. Rec., 167-179) the 4th, 5th and 6th assignments seem to have been sustained.

The 4th assignment alleges that the District Court should have held that it was without jurisdiction, power, or authority to control, by writ of injunction or otherwise, the administration, discretion and action of the United States Railroad Labor Board and the members thereof in the discharge of their functions under Title III of the Transportation Act of 1920.

The 5th assignment alleges that the District Court erred in substituting its judgment and discretion for the judgment and discretion of the United States Railroad Labor Board and the members thereof in a matter resting for its determination exclusively within the jurisdiction of the United States Railroad Labor Board and the members thereof.

The 6th assignment alleges that the District Court erred in holding and adjudging that it had jurisdiction, power and authority to control by writ of injunction or otherwise the administration, discretion and action of the United States Railroad Labor Board and the members thereof after holding that Title III of the Transporta-

tion Act of 1920 was constitutional and valid in its entirety.

Assignment 4 assumes that in ordering the carrier to meet in conference labor unions and system federations of labor unions as the representatives of its employees rather than individual representatives selected from among its own employees, union and nonunion alike, the Labor Board was acting within its discretion and discharging a function conferred upon it by Title III of the Transportation Act.

Assignment 5 assumes that it was within the discretion of the Labor Board and exclusively within its power to determine under Title III that carriers should confer with labor unions and heads of system federations of labor unions, as such, as representatives of its employees rather than with individual representatives selected by its employees, both union and nonunion, and that the District Court substituted the court's judgment and discretion for the judgment and discretion of the Labor Board.

Assignment 6 assumes that the subject matter of dispute was within the discretion of the United States Railroad Labor Board and that the District Court was without power to control said discretion by writ of injunction or otherwise.

Upon these three assignments the decision of the Circuit Court of Appeals must stand or fall.

The allegations of the bill not having been denied the material averments thereof, with all their intendments, must be taken as true for the purpose of the motions to dismiss.

In the District Court upon a construction of pertinent sections it was held that *the appointment or method of election of conferees was not a function delegated to the board.*

In the United States Circuit Court of Appeals without construing pertinent sections it was held that *whether or not* the appointment or method of election of conferees was one of the *functions delegated to the board* was a matter in the *discretion* of the board and its discretion was not subject to review.

The Circuit Court of Appeals declared that "whether the employees may if they choose be represented by an organization as held by the board or whether they may be represented only by individuals who were employees of the same employer as contended by appellee is not properly a question for a court * * *. But in so far as it was for the board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question and the manner of its disposition was for the board, no question here arising as to the board's good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee it is not for the court to substitute its opinion for that of the board in matters of law committed to the board." (Pr. Rec. 177-178.)

The decree of the District Court was reversed, and the cause remanded to that court, with directions to dismiss the bill.

If Title III does not make the appointment, or method of election of conferees under Section 301 a function of the board, as declared in the District Court, and not disputed in the Circuit Court of Appeals, can the Labor Board, nevertheless, be endowed with a discretion to function in the election of conferees, or not to function as it may elect, and its action be immune from review.

Thus the Circuit Court of Appeals upholds Board Decision 218 under a supposed discretion—not under an express power conferred by the act—and declines to con-

sider the pertinent constitutional questions raised by the carrier.

Petitioner here denies that Title III of the Transportation Act of 1920 authorizes the Labor Board

(a) To compel carriers to confer with officers of labor unions and system federations of labor unions, as such, in *negotiating rules and working conditions* with their employees.

(b) To compel carriers to agree that a labor organization may act through representatives of its own choice in negotiating rules and working conditions with carriers *whether such representatives are employees of the carrier or not.*

(c) To declare that the majority of any craft may select an *organization* to represent its members in negotiating rules and working conditions and that the *carrier shall agree thereto and confer with the designated organization.*

(d) To declare elections held to select conferees under Section 301 of said title void.

(e) To *invalidate contracts* covering rules and working conditions which are being conformed to by all the carrier's employees, union and nonunion alike.

Petitioner contends that if Decision 218 is not authorized by the said title the board is without power or discretion to publish The Pennsylvania Railroad Company for refusing to conform thereto to the irreparable injury of its property, which the bill alleges will inevitably follow such publication.

Petitioner further contends that if said act respectively authorizes the board as above it violates the due process clause of the Constitution of the United States and is void.

Other questions are incidentally involved but the foregoing cover the controlling propositions submitted hereby if the writ prayed for is granted.

BRIEF OF ARGUMENT.

I.

CONSTRUCTION OF SECTION 301 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

II.

CONSTRUCTION OF SECTION 307 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

III.

CONSTRUCTION OF SECTION 308 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

IV.

CONSTRUCTION OF SECTION 313 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

V.

THE FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR ON APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS.

VI.

(A) WHETHER A SUIT IN A FEDERAL COURT WHICH INVOLVES AN ACT OF CONGRESS IS A SUIT AGAINST THE GOVERNMENT DEPENDS UPON THE SAME PRINCIPLES THAT DETERMINE WHETHER A SUIT IN A STATE COURT WHICH INVOLVES A STATE STATUTE IS A SUIT AGAINST THE STATE.

Tindal et al. v. Wesley, 167 U. S. 204, 213; 42 L. Ed. 137, 140.

Kansas v. United States, 204 U. S. 331; 51 L. Ed. 510.

(B) THE BILL DOES NOT SEEK TO ENJOIN EITHER DISCRETION OR AUTHORIZED FUNCTIONS OF A LEGAL GOVERNMENTAL AGENCY OF THE UNITED STATES.

A SUIT PENDING IN A FEDERAL COURT AGAINST STATE OFFICERS TO ENJOIN THEM FROM TAKING ACTION IN THE NAME OF AND FOR THE STATE, UNDER COLOR OF THEIR OFFICES, TO ENFORCE AN UNCONSTITUTIONAL STATUTE IS MAINTAINABLE AND IS NOT A SUIT AGAINST THE STATE

Ex Parte Young, 209 U. S. 123; 52 L. Ed. 714.

Western Union Telegraph Co. v. Andrews, 216 U. S. 165; 54 L. Ed. 430.

Osborn v. Bank of the United States, 9 Wheat. 738; 6 L. Ed. 204.

Davis v. Gray, 16 Wall. 203; 21 L. Ed. 447.

Board of Liquidation v. McComb, 92 U. S. 531; 23 L. Ed. 623.

Pennoyer v. McConaughy, 140 U. S. 1; 35 L. Ed. 363.

In re Tyler, 149 U. S. 164; 37 L. Ed. 689.

Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819.

Prout v. Starr, 188 U. S. 537; 47 L. Ed. 584.

Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135; 54 L. Ed. 970.

Louisville & N. R. Co. v. Bosworth et al. 209 Fed. 380.

Greene, Auditor, et al. v. Louisville & I. R. Co. 244 U. S. 499; 61 L. Ed. 1280.

Bonnett v. Vallier, 136 Wis. 193; 17 L. R. A. (N. S.) 486.

VII.

A SUIT TO ENJOIN OFFICERS AND BOARDS FROM EXERCISING AN EXCESS POWER, NOT AUTHORIZED BY A STATUTE, IS MAINTAINABLE EVEN THOUGH THE STATUTE BE CONSTITUTIONAL.

Reagan v. Farmers Loan & Trust Company, 154 U. S. 362; 38 L. Ed. 1014.

Prentis v. Atlantic Coast Line Railroad Company, 211 U. S. 210; 53 L. Ed. 150.

Louisville & Nashville Railroad Co. v. R. Hudson Burr et al. Railroad Commissioners, 63 Fla. 491.

Louisville & Nashville R. Co. v. Bosworth et al. 209 Fed. 380 (District Court, E. D. Ky., Frankfort Division, 1913).

Robert L. Greene (successor of Henry M. Bosworth), Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation and Assessment for the State of Kentucky et al. Appts. v. Louisville & Interurban Railroad Company, 244 U. S. 499; 61 L. Ed. 1280 (No. 617).

Raymond v. Chicago Union Traction Co. 207 U. S. 20, 38; 52 L. Ed. 78, 88; 28 Sup. Ct. Rep. 7; 12 Ann. Cas. 757.

Siler v. Louisville & N. R. Co. 213 U. S. 175, 191; 53 L. Ed. 753, 757; 29 Sup. Ct. Rep. 451.

Ohio Tax Cases, 232 U. S. 576, 586; 58 L. Ed. 737, 743; 34 Sup. Ct. Rep. 372.

25 Ruling Case Law, 414, Section 51.

VIII.

THE FIRST PARAGRAPH OF THE STATEMENT OF FACTS WHICH PRECEDES THE OPINION FILED IN THE CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH EITHER THE FACT OR THE DECREE ENTERED IN THE DISTRICT COURT.

IX.

THE BOARD IS NOT ENDOWED WITH ANY DISCRETION EXCEPT AS TO SUCH FUNCTIONS AS ARE IMPOSED UPON IT BY LAW. THE SELECTION OF CONFEREES FOR CONFERENCES IS NOT SUCH A FUNCTION.

X.

TITLE III NEITHER DIRECTLY, NOR INDIRECTLY, IMPOSES LABOR UNIONS, AS SUCH, OR INDIVIDUALS NOT IN ITS EMPLOY, UPON THE CARRIER, AS CONFEREES IN CONFERENCES CONTEMPLATED BY THE ACT.

XI.

IF THE LABOR BOARD INHERITED JURISDICTION OVER DISPUTES CONCERNING RULES AND WORKING CONDITIONS IT WAS OUSTED OF JURISDICTION WHEN THE PENNSYLVANIA RAILROAD COMPANY AND ITS EMPLOYEES SETTLED SUCH DISPUTES.

XII.

THE BILL ALLEGES, AND THE MOTIONS TO DISMISS ADMIT, THAT THE LABOR BOARD DETERMINED THAT THE PENNSYLVANIA RAILROAD COMPANY HAD REFUSED TO CONFORM TO ITS DECISION 218 AND THEREUPON ORDERED PUBLICATION AGAINST SAID COMPANY UNDER SECTION 313. THE RAILROAD COMPANY THEN FILED ITS BILL TO ENJOIN SUCH PUBLICATION ON THE GROUND THAT DECISION 218 WAS NOT WITHIN THE POWER OF THE BOARD TO RENDER. THE ADMISSION PRECLUDES THE SUGGESTION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS THAT THE MOTION TO VACATE DECISION 218 IS STILL PENDING BEFORE THE BOARD.

XIII.

THE CONSTITUTIONAL QUESTION RAISED BY THE PLEADINGS
IS PERTINENT AND WELL TAKEN. THE CIRCUIT COURT
OF APPEALS ERRED IN REFUSING TO CONSIDER THE SAME.

Wilson v. New, 243 U. S. 332; 61 L. Ed. 755.

Wilson v. New, 243 U. S. 373; 61 L. Ed. 784 (dis-
senting opinion by Justice Pitney).

Wilson v. New, 243 U. S. 364; 61 L. Ed. 780 (dis-
senting opinion by Justice Day).

Adair v. United States, 208 U. S. 161; 52 L. Ed.
436.

*Ft. Smith & Western Railroad Company et al.
v. Mills, Receiver, etc.* 253 U. S. 206; 64 L. Ed.
862.

ARGUMENT.

I.

CONSTRUCTION OF SECTION 301 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

The decree appealed from perpetually enjoins the United States Railroad Labor Board and its members from assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act unless and until there has been a joint submission of the dispute by the carrier and employees which has been the subject matter of conference between them and from making publication of any matter based upon any action taken by the board which did not result from such joint submission.

The decree requires the Labor Board to function in accordance with the act. It restrains the Labor Board from exercising power which the act does not confer. It takes from the Labor Board no power. The construction of Section 301, and the power of the board thereunder, as declared by Judge Page, is in exact accord with the language of the section.

Section 301 of Title III is as follows:

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any

dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Under this section the duty devolves upon carriers, officers, employees and agents to do everything that can reasonably be done *to avoid interruption in the operation of the carrier* growing out of disputes contemplated by the section between the carrier and its employees or subordinate officials. To that end the section requires the representatives designated by the carriers, employees or subordinate officials, *directly interested in the dispute*, to confer in an effort to settle any such dispute. The section imposes no power or duty upon the board in connection with the effort of the carriers, officers, employees and agents to avoid interruption in operation, or in the selection of conferees. The section confers no power upon the board to dictate procedure under which such representatives, or conferees, shall be selected. The section confers no power upon the board to prescribe an election or the qualifications for voting if an election is held. The selection of conferees is neither directly nor indirectly within the control of the board. The section provides that if the conferees fail to settle the dispute "*the parties thereto*" shall refer such dispute to the board and thereupon "*under the provisions of this title*" the Labor Board is "*authorized to hear and decide said dispute*." The representatives of the carrier and its employees and subordinate officials, or the conferees representing them, are "*the parties thereto*." The conferees *having failed to agree and having jointly submitted the dispute to the Labor Board*, the section authorizes the Labor Board to function and to hear and decide the dispute. The power of the Labor Board is *limited* to hearing and deciding the dispute so

submitted. It is without power to go behind the joint submission and inquire into the procedure under which conferees were selected, or into the qualifications of electors in the selection of conferees. The parties having made a joint submission the dispute is before the board for hearing and decision. Having heard and decided it, the board has performed its function as a Board of Arbitration under Section 301.

Said section does not confer power upon the board to prescribe *rules* to govern the carrier and its employees, or its subordinate officials, in *selecting representatives for conference*, nor does it confer power upon the board to prescribe principles to govern and control the carrier, and its employees, and its subordinate officials in *selecting representatives for such conference*.

Section 301, therefore, *provides for voluntary arbitration only* and does not confer power upon the Labor Board to *assume jurisdiction* over a dispute between the carrier, its officers, employees and agents upon an *ex parte submission*.

II.

CONSTRUCTION OF SECTION 307 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

Section 307 of said act provides that where an appropriate adjustment board has not been organized under the provisions of Section 302 (and no such board has been organized here), the Labor Board may, upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, or upon a petition signed by not less than 100 unorganized employees, or subordinate officials, directly interested in

the dispute, or upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing and as soon as practicable and with due diligence decide disputes involving grievances, rules, or working conditions, or wages, or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301 of said act—that is, by a conference or by a voluntary submission to arbitration.

Section 307, paragraph (a), of Title III of the Transportation Act, concerns rules and working conditions, and is as follows:

“(a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed, or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of Section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in Section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of Section 303.”

Here the act confers power upon the board on its own

motion or on *ex parte submissions* to receive and decide disputes involving grievances, rules or working conditions—and under paragraph (b) thereof—wages or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301, if such disputes are likely to substantially interrupt commerce.

Thus submissions under this *section* may be *ex parte* or on the board's own motion.

An *ex parte* submission may be made by the chief executive of any carrier, or organization of employees, or subordinate officials, whose members are directly interested in the dispute.

Section 307, provides a way for *one party* to take a dispute, within its purview, to the Labor Board without regard to the other party. Section 301 does not provide for an *ex parte* submission of any dispute to the Labor Board. The difference between Sections 301 and 307 in this respect is conclusive that Section 301 contemplates voluntary arbitration and Section 307 compulsory arbitration.

The only disputes which said board may acquire jurisdiction to consider under the provisions of said Section 307¹ are such as concern rules, working conditions, and grievances growing out of the administration of such rules and such working conditions, and wages. Neither said section nor any other confers power upon or authorizes said board to prescribe rules to govern the carrier and its employees in selecting representatives to confer in an effort to avoid any interruption to the operation of the carrier growing out of disputes between the carrier and its employees or subordinate officials thereof, or to prescribe principles to govern and control said carrier and its employees in selecting representatives to such conference. Matters of procedure preceding and

leading up to and culminating in the conference contemplated by Section 301 are not within the jurisdiction of the Labor Board or within its power to control.

III.

CONSTRUCTION OF SECTION 308 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

In an opinion filed on September 16, 1921, Docket No. 404, on the application of the Pennsylvania Railroad Company to vacate Decision No. 218, the board said, the *italics* being ours (Pr. Rec. 116) :

“2. The right of the board to adopt the principles set out in Decision 119 and in other decisions, for the guidance of carriers and employees, is questioned.

It is a settled principle of law that under a remedial act, as this is, even where not expressly given, sufficient powers are implied to enable the purposes of the act to be accomplished. But in *this instance the power is expressly given in the language of the statute*, namely, ‘The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title.’ ”

It would seem from the foregoing quoted from the act that the board finds authority to impose said sixteen principles on carrier and employee therein and not upon an implied power. The quotation is from Section 308. That section relates to and concerns the election of a chairman, places for board meetings, duty to study relations between carriers and employees, to make regulations necessary for the efficient execution of its functions and for the publication of its decisions. The section deals exclusively with procedure and authorizes the board to make regulations necessary to enable it to function—not to enable carriers, or employees, or labor

unions to function, but to enable it to function under the act. The language of the quotation does not delegate power to the board to legislate or authorize it to read into the act powers which are not there. *The board does not find justification for the promulgation of said principles in Sections 301 or 307, or any construction thereof, but upon the quotation from Section 308 as express authority.* It necessarily follows that Principles 5 and 15 promulgated by the board are not within the act. The language quoted does not authorize the board to promulgate said principles and impose them upon carriers under threat of holding protesting carriers up to the world as outlaws.

Such a defense of these 16 principles by the board is an admission that they are not within the act and that unless Section 308, which concerns board procedure only, authorizes them their promulgation cannot be justified.

IV.

CONSTRUCTION OF SECTION 313 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

Section 313 of said act authorizes the board, when it has reason to believe that any decision of the Labor Board has been violated by carrier, or employees, or subordinate official, or organization thereof, upon its own motion, after due notice and hearing to all persons directly interested, to determine whether or not such violation has occurred and if it has to publish its decision in such manner as it may determine. The section seems to authorize such determination and publication for a violation of any decision. While the language covers all decisions it cannot extend to and authorize publication for a refusal to conform to a decision which the

board is without jurisdiction to make. An unauthorized decision is not within the section.

It is insisted by petitioner that the board was without power to declare the said election illegal and the said contracts entered into with its employees under said election void, and was without power to order and direct a second election as it did under Decision No. 218. The carrier, having conducted an election in strict accord with the spirit and the letter of Section 301, at which all employees in its shop crafts, both union and nonunion, were invited to participate in selecting persons to represent them, and representatives so selected having subsequently met the representatives of the carrier and having entered into contracts with the carrier, declined to take part in a second election and to concede power in the board to declare said election illegal and said contracts so entered into void.

If Title III of the Transportation Act of 1920 assumes to confer power upon the Labor Board to compel carrier and employee to obey every decision which the Labor Board assumes to make under the coercive influence of a threat of publication, whether or not the subject matter thereof is within the jurisdiction of the board, the part of said Title III professedly conferring such power is unconstitutional.

V.

THE FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR ON APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS.

The fourth error assigned is that the court should have adjudged that the United States District Court was without power or authority to control by writ of

injunction or otherwise the *administration, discretion and action of the United States Railroad Labor Board and the members thereof in the discharge of their functions under Title III of the Transportation Act.* (Pr. Rec., 150.)

The fifth error assigned is that the court erred in *substituting the judgment and discretion of the court for the judgment and discretion of the United States Railroad Labor Board and the members thereof in a matter which rested for its determination exclusively within the jurisdiction of the Labor Board.* (Pr. Rec., 150.)

The sixth error assigned is that the court erred in holding and adjudging that the United States District Court had jurisdiction, power and authority to control by writ of injunction or otherwise the *administration, discretion and action of the United States Railroad Labor Board and the members thereof* after holding that Title III of the Transportation Act was constitutional and valid in its entirety and that the decisions of the United States Railroad Labor Board and the members thereof are only advisory. (Pr. Rec., 150.)

The District Court did not hold that it had *jurisdiction, power or authority to control by writ of injunction or otherwise the administration and discretion of the Labor Board and its members in the performance of functions conferred on that body by Title III of the Transportation Act, nor did the District Court substitute the judgment and discretion of the court for the judgment and discretion of the United States Railroad Labor Board and its members as to any matter which was entrusted to the administration and discretion of the United States Railroad Labor Board by said act.*

The District Court held that the appointment or method of election of conferees under Section 301 was

not one of the functions delegated to the board and therefore the board was without power to prescribe and require the observance of the regulations set out in Decision 218 on pages 8, 9 and 10. (Pr. Rec., 139.) If the appointment or method of electing conferees under Section 301 is not a function delegated to the board, the board was without power or authority in the premises and the District Court in enjoining the board and its members from exercising such power did not enjoin the *administration or discretion* of any function conferred on the board by the act.

In view of the scope of the injunctional order, it is immaterial whether the Labor Board is or is not a corporation with capacity to sue and be sued. In the District Court Judge Page said (the italics being ours) (Pr. Rec., 136):

"In my opinion the Labor Board is a body corporate subject to the jurisdiction of the federal courts and may sue and be sued. This does not mean, however, that the *courts* have any general authority over the exercise of a *discretion vested in an administrative body or officer*."

The court here disavows power to control the *administration and discretion* vested in the United States Railroad Labor Board when such *administration and discretion* is a function conferred upon the board by the act, but holds that the power to take jurisdiction of and to supervise any matter which precedes a joint submission to the board under Section 301 *is not a function* conferred upon the Railroad Labor Board and *may be enjoined*.

To read Section 301 is to agree with the construction given to it by Judge Page. Its language cannot be warped to mean anything else. The fact that the effort of the board to direct and control concerned matter

which precedes the power of the board to function is conclusive as to the question of "administration and discretion" and disposes of Errors 4, 5 and 6 as assigned.

Public officials and governmental boards will not be enjoined from the performance of matters which rest in their *discretion* or *judgment* under the provisions of law. Injunctions will not be entered against an officer of the United States in the discharge of *an official duty which requires the exercise of judgment and discretion*. A court will not direct or control a governmental board in the exercise of its judgment as to *matters which the law entrusts to its judgment*. Officers and boards will not be enjoined when they are *acting in accordance with authority conferred by a valid statute*. An officer of the Land Department will not be enjoined *when performing a function authorized by law and entrusted to the Land Department*. While *public officials and boards* will not be enjoined in the exercise of *discretionary power* when acting in good faith, *they will be enjoined when their action is an abuse of their discretion, is fraudulent or in bad faith*. *County commissioners vested with discretionary powers* will not be enjoined *in the absence of fraud or abuse of discretion*. In applications for injunctions against *public officials and boards* the courts uniformly refuse to enjoin a matter which is *within the discretion of such public officials and boards* unless there is an *abuse of discretion*. The bill here does not seek to enjoin the board and its members from exercising *any power conferred upon it by the act*. It does seek to enjoin the board *from exercising power not conferred upon it by the act or entrusted to its discretion*, to the irreparable property injury of the plaintiff. In cases where *public officials and governmental boards have*

presumed to exercise unauthorized power *not within their discretion or judgment*, the courts have not hesitated to enjoin, the facts presenting necessary elements of equitable jurisdiction. In cases where *public officials and governmental boards* have acted under a *discretion conferred by law*, the courts have not hesitated to refuse to enjoin the action complained of as being authorized under a discretion conferred by law.

VI.

WHETHER A SUIT IN A FEDERAL COURT WHICH INVOLVES AN ACT OF CONGRESS IS A SUIT AGAINST THE GOVERNMENT DEPENDS UPON THE SAME PRINCIPLES THAT DETERMINE WHETHER A SUIT IN A STATE COURT WHICH INVOLVES A STATE STATUTE IS A SUIT AGAINST THE STATE.

It was contended both in the District Court and in the Circuit Court of Appeals that this is a suit against the Government of the United States without governmental consent and cannot be maintained. It was further contended that the bill seeks to enjoin the Railroad Labor Board from the exercise of discretion and judgment conferred upon it by the act in the administration of its functions. If we understand the opinion of the Circuit Court of Appeals the decree of the District Court was not reversed and remanded because the suit was against the Government and consent to sue had not been obtained. Nevertheless that contention is preserved in the record by assignment of error No. 3. (Pr. Rec., 150.) If Title III does not confer discretion upon the board to promulgate Principles 5 and 15, or to declare elections illegal, or to hold contracts and agreements entered into void, suit to enjoin would not be against the government and would be maintainable, without the con-

sent of the government. If the act authorizes the board to promulgate said principles, or to declare elections illegal, or to hold contracts and agreements entered into void, the act is unconstitutional and suit would be maintainable to restrain the enforcement of the unconstitutional act to the irreparable injury to the property of the carrier without governmental consent.

Tindal et al. v. Wesley, 167 U. S. 206, 42 L. Ed. 140, involved the right to the possession of land under purchase from the commissioners of a South Carolina sinking fund. The court held that an action to obtain possession of the land instituted against the individuals who had the actual possession and control of the land is not to be deemed an action against the state within the meaning of the Eleventh Amendment to the Federal Constitution simply because those individuals claimed to be in rightful possession of the land as officers or agents of the state, and asserted title and right of possession in the state. The judgment below was in favor of the plaintiff against the defendants for the recovery of the possession of said property. The judgment was affirmed in the Supreme Court.

The following is quoted from the opinion (213):

“But it cannot be doubted that the question whether a particular suit is one against the state within the meaning of the Constitution must depend upon the same principles that determine whether a particular suit is one against the United States.”

In *Kansas v. United States*, 204 U. S. 343, the court held that whether a suit is one against the state is to be determined not by the fact of the party named as defendant on the record but by the result of the judgment or decree which may be entered and that the same rule must apply to the United States; that the question whether the United States is a party to a controversy

is not determined by the merely nominal party on the record but by the question of the effect of a judgment or decree which can be entered.

It follows that whether or not a controversy is against a state, or against the United States, is determined by the same principles. If principles determine the fact in one case, like principles will determine the fact in the other case.

THE BILL DOES NOT SEEK TO ENJOIN EITHER DISCRETION OR AUTHORIZED FUNCTIONS OF A LEGAL GOVERNMENTAL AGENCY OF THE UNITED STATES.

A SUIT PENDING IN A FEDERAL COURT AGAINST STATE OFFICERS TO ENJOIN THEM FROM TAKING ACTION IN THE NAME OF AND FOR THE STATE UNDER COLOR OF THEIR OFFICES TO ENFORCE AN UNCONSTITUTIONAL STATUTE IS MAINTAINABLE AND IS NOT A SUIT AGAINST THE STATE.

Ex Parte Young, 209 U. S. 123; 52 L. Ed. 714.
Western Union Telegraph Co. v. Andrews, 216 U. S. 165; 54 L. Ed. 430.

Osborn v. Bank of the United States, 9 Wheat. 738; 6 L. Ed. 204.

Davis v. Gray, 16 Wall. 203; 21 L. Ed. 447.

Board of Liquidation v. McComb, 92 U. S. 531; 23 L. Ed. 623.

Pennoyer v. McConaughy, 140 U. S. 1; 53 L. Ed. 363.

In re Tyler, 149 U. S. 164; 37 L. Ed. 689.

Smyth v. Ames, 169 U. S. 466; 42 L. Ed. 819.

Prout v. Starr, 188 U. S. 537; 47 L. Ed. 584.

Herndon v. Chicago, R. I. & P. R. Co. 218 U. S. 135; 54 L. Ed. 970.

Louisville & N. R. Co. v. Bosworth et al. 209 Fed. 380.

Greene, Auditor, et al. v. Louisville & I. R. Co. 244 U. S. 499; 61 L. Ed. 1280.

In each of the foregoing suits in equity the court held that it had jurisdiction to determine the constitutionality of the various statutes involved which state officers or boards were about to enforce, and to enjoin the enforcement of such statutes as it found to be unconstitutional.

Robert L. Greene (successor of Henry M. Bosworth), auditor, Sherman Goodpaster, treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation and Assessment for the State of Kentucky, et al., appts., v. Louisville & Interurban Railroad Company, 244 U. S. 499, 61 L. Ed. 1280 (No. 617), reviews *Louisville & Nashville R. R. Co. v. Bosworth et al.* 209 Fed. 380.

The following is quoted from the opinion:

"(2) A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the State of Kentucky, are in effect suits against the state. Questions of this sort have arisen many times in this court, but the matter was set at rest in *Ex Parte Young*, 209 U. S. 123, 150, 155, 52 L. Ed. 714, 725, 727, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was held that a suit to restrain a state officer from executing an unconstitutional statute in violation of plaintiff's rights and to his irreparable damage, is not a suit against the state, and that 'individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the federal Constitution, may be enjoined by a federal court of equity from such action.'

In repeated decisions since *Ex Parte Young*, that case has been recognized as setting these questions at rest. *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 166, 54 L. Ed. 430, 431, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135,

155, 54 L. Ed. 970, 976, 30 Sup. Ct. Rep. 633; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 56 L. Ed. 570, 577, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 517, 33 Sup. Ct. Rep. 312; *Truax v. Raich*, 239 U. S. 33, 37, 60 L. Ed. 131, 133, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7. And see *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 642-644, 55 L. Ed. 890, 894, 895, 35 L. R. A. (N. S.), 243, 31 Sup. Ct. Rep. 654."

Bonnett v. Vallier, 136 Wis. 193, 17 L. R. A. (N. S.) 486, was an action by a property owner to restrain certain public officers from enforcing certain statutory provisions relating to buildings. In the court below a demurrer was filed to the complaint, which was overruled and an injunction was issued as prayed for. The court affirmed the judgment below. It was alleged that the act sought to be enforced was unconstitutional. The Supreme Court held:

1. That a person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof.
2. That an action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only.
3. That an unconstitutional legislative enactment, though in law form, is in fact not law at all. It confers no rights, it imposes no duties, it affords no protection and is in legal contemplation as inoperative as though it had never been passed.
4. That a court, upon its jurisdiction being properly invoked for the purpose, is in duty bound to test a legislative enactment by all constitutional limitations bear-

ing thereon and condemn it if it be found illegitimate and thus uphold the Constitution as superior to legislative will.

The court held the law to be unconstitutional.

VII.

A SUIT TO ENJOIN OFFICERS AND BOARDS FROM EXERCISING AN EXCESS POWER, NOT AUTHORIZED BY A STATUTE, IS MAINTAINABLE EVEN THOUGH THE STATUTE BE CONSTITUTIONAL.

In *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. Ed. 1014, the threatened action sought to be enjoined was not action to enforce, or in pursuance of an unconstitutional statute, but action to enforce transportation rates fixed by the Texas Railroad Commission under a constitutional statute empowering it to fix such rates, on the ground that the rates so fixed were confiscatory, and hence that the act of the Railroad Commission—not the statute—was unconstitutional. The suit was held to be maintainable.

The suit was one to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authorities and the court held that such a suit was not against the state and was not within the prohibition of the Eleventh Amendment, the state being interested only in a governmental and not in a pecuniary sense. The court said, among other things:

“Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands may not be obnoxious to any

challenge and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

To the same effect is the case of *Prentis v. Atlantic Coast Line Railroad Company*, 211 U. S. 210, 53 L. Ed. 150. The court held that when a railroad commission has fixed a rate, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state and will be the proper form of remedy.

In *Louisville & Nashville Railroad Co. v. R. Hudson Burr et al. Railroad Commissioners*, 63 Fla. 491, the court held that when officers of the state act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights guaranteed by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the state, since the acts of officials that are not legally authorized or that exceed or abuse authority of discretion conferred upon them are not acts of the state.

In *Louisville & Nashville R. Co. v. Bosworth et al.* 209 Fed. 380 (District Court, E. D. Ky. Frankfort Division, 1913), the court held that the right to maintain a suit in a federal court against state officers to enjoin them from taking action which they threaten to take in the name of and for the state is not limited to cases where such action is to enforce or pursuant to an unconstitutional statute, but such suit is not against the state and is maintainable if for any reason the officers have no

right to take such action, and it will be a wrong to plaintiff such as equity will enjoin.

The court held that the true test of the maintainability in a federal court of a suit to enjoin state officers from doing an act in the name of and for the state as against the objection that it is a suit against the state is to be found in the consideration of the relief sought therein. If it is relief against the state the suit is not maintainable, since the state, although not made a party to the record, is an indispensable party to the suit, but if the sole relief sought is against the officers to prevent them from enforcing *an unconstitutional law or acting in excess of the law*, it is maintainable, although the state may be affected by the result and would be a proper party.

The court further held that *action against state officers who are proceeding under an unconstitutional statute should be enjoined because action thereunder is a wrong to the plaintiff* and that *action under a constitutional statute but in excess thereof and not within the statute should be enjoined, because such action would likewise be a wrong to the plaintiff.*

Robert L. Greene (successor of Henry M. Bosworth), Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation and Assessment for the State of Kentucky et al. Appts. v. Louisville & Interurban Railroad Company, 244 U. S. 499, 61 L. Ed. 1280 (No. 617) not only holds that a suit in a federal court against state officers to enjoin them from taking action in the name of and for the state, under color of their offices, to enforce an unconstitutional statute, is not a suit against the state, but holds that the principle is not confined to a suit to enjoin *an unconstitutional statute*, but also applies in a

uit to enjoin state officers and boards from exercising in excess of power not authorized by a statute, though the statute itself be constitutional. The following is quoted from the opinion:

"The principle is not confined to the maintenance of suits for restraining the enforcement of statutes which, as enacted by the state legislature, are in themselves unconstitutional. *Reagan v. Farmers' Loan & T. Co.* 154 U. S. 362, 390, 38 L. Ed. 1014, 1021, 4 Inters. Com. Rep. 560, 14 Sup. Ct. Rep. 1047, was a case not of an unconstitutional statute, but a confiscatory, and therefore unconstitutional, action taken by a state commission under a constitutional statute. The court, by Mr. Justice Brewer, said: 'Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual.' In *Raymond v. Chicago Union Traction Co.* 207 U. S. 20, 38, 52 L. Ed. 78, 88, 28 Sup. Ct. Rep. 7, 12 Ann. Cas. 757, the court upheld the right of action in a federal court to restrain the collection of taxes that had been assessed at a different rate and by a different method from that employed with respect to other taxpayers of the same class, in defiance of the provisions of a constitutional statute that required equalization, and also in denial of the equal protection of the laws within the meaning of the Fourteenth Amendment.

(3) The contention of plaintiffs set forth in their respective bills of complaint, that the action of the Board of Valuation and Assessment in making the assessments under consideration and the threatened action of defendants in respect of carrying those assessments into effect constituted action by the state and if carried out would violate the equal protection

provision of the Fourteenth Amendment, presents, without question, a real and substantial controversy under the Constitution of the United States, which (there being involved a sum and value in excess of the jurisdictional amount) conferred jurisdiction upon the federal court, irrespective of the citizenship of the parties. This being so, the jurisdiction of that court extended, and ours on appeal extends, to the determination of all questions involved in the case, including questions of state law, irrespective of the disposition that may be made of the federal question, or whether it be found necessary to decide it at all. *Siler v. Louisville & N. R. Co.* 213 U. S. 175, 191, 53 L. Ed. 753, 757, 29 Sup. Ct. Rep. 451; *Ohio Tax Cases*, 232 U. S. 576, 586, 58 L. Ed. 738, 743, 34 Sup. Ct. Rep. 372."

The following is quoted from 25 Ruling Case Law, 414
Section 51 (the italics being ours):

"The state's immunity from suit does not extend to a suit against state officers to enjoin the threatened enforcement of an unconstitutional enactment to the injury of the rights of the plaintiff to constitutional rights. In such circumstances the law affords such state officers no protection. They are judicially regarded as acting in their personal capacities only. In other words, the acts of officials that *are not legally authorized* or that *exceed or abuse the authority of discretion* conferred upon them are not acts of the state. From this it is obvious that where action taken by state officials is unauthorized and substantially impairs private rights in violation of the Constitution it will not be enforced."

Greene, Auditor, v. Interurban Railroad Company, 24 U. S. 499, 61 L. Ed. 1280, is the latest recognition by the Supreme Court of the United States of the distinction between suits brought to restrain the enforcement of unconstitutional statutes or to restrain acts and doings of boards under constitutional statutes which are not authorized by the statute, and suits against the Govern-

ment. The court cites many decisions of the Supreme Court which recognize the distinction and hold that the question is at rest.

It follows from the foregoing authorities:

1. *That suits to enjoin action under unconstitutional statutes are not suits against the government.*
2. *That suits to enjoin state boards and members thereof from actions which constitutional statutes do not authorize are not suits against the Government.*
3. *That in either case, suits to enjoin are maintainable.*

VIII.

THE FIRST PARAGRAPH OF THE STATEMENT OF FACTS WHICH PRECEDES THE OPINION FILED IN THE CIRCUIT COURT OF APPEALS IS NOT IN ACCORD WITH EITHER THE FACT OR THE DECREE ENTERED IN THE DISTRICT COURT.

The question in dispute concerns the character of employee representation for conference with the carrier under Title III of the Transportation Act of 1920. It does not involve any dispute between carrier and employees over *rules and working conditions*. No dispute as to *rules and working conditions* was pending between carrier and employees and such a dispute could not, therefore, have been the subject matter of any decision by the Labor Board. The question pending before the board which gave rise to Decision 218 (Pr. Rec., 92) was on an *ex parte submission* by heads of labor unions, as such, inquiring whether or not an open shop railroad could be compelled to meet in conferences contemplated by Section 301 of said Title III, *labor unions, as such, and system federations of labor unions, as such*, instead of indi-

vidual representatives selected by its employees from among its *union, and nonunion employees, alike, who were personally interested in the subject matter of dispute.*

Here the Circuit Court of Appeals, in the first paragraph of its statement of facts, falls into error. The statement is as follows (the italics being ours) (Pr. Rec. 167):

“The appeal is by the United States Labor Board and its members from a *decree* in the suit of The Pennsylvania Railroad Company, enjoining the board and its members from proceeding under Section 301 of the Transportation Act, *from determining a dispute concerning rules and working conditions*, unless there has been a joint submission of the dispute to the board by appellee carrier and its employees and from making publication of any decision as to matters submitted contrary to the injunctive order.”

That the court here misstated the subject matter presented to the Labor Board appears from the following quoted from subsequent paragraphs of said statement of facts, which refer to Board Decision 119 promulgated on April 14, 1921 (the italics being ours) (Pr. Rec. 168-170):

“The decision called upon the officers of the carriers and organizations of employees to designate representatives to confer and decide so far as possible respecting *rules and working conditions* for each such carrier. * * *

It was provided in the decision that *rules agreed to by such conferences should be consistent with certain stated principles*. Appellee, while resisting the right of the board to impose upon it any limitations or principles respecting the subject, objects more specifically to principles numbered 5 and 15 which are:

The right of such lawful organization to act towards lawful objects through representatives of its own choice, *whether employees of a particular carrier or otherwise, shall be agreed to by management*

The majority of any craft or class of employees shall have the right to determine *what organization shall represent members of such craft or class.*
• • •"

The statement of facts recites that on July 26, 1921, Decision No. 218 was promulgated by the Labor Board on an *ex parte complaint and submission to the board by the Railway Employees Department of the American Federation of Labor on behalf of System Federation No. 90*, representing to the board that the carrier had refused to negotiate with the officers of labor unions as such; that the carrier had prepared ballots and sent them to all employees, union and nonunion alike, upon which to designate their choice for representatives; that the officers of System Federation No. 90 objected to the ballot because it did not recognize the rights of union employees to be represented in such conference by representatives of its own choice, whether such representatives were employees of the carrier or not, and because said ballots did not authorize union employees to vote for an organization to represent them as was authorized by principles 5 and 15 attached to Decision 119; that System Federation No. 90 issued a ballot of its own, on which System Federation No. 90 was specified to be voted for as the employees' representative; that the carrier recognized the individual representative selected at said election from among its employees, union and nonunion alike, and entered into conference with them as to *rules and working conditions* and *at such conference rules and working conditions were agreed upon* which were thereupon put into force; that on said *ex parte* submission the Labor Board declared in Decision 218, though not involved under the submission and though no complaint against the rules and working conditions so agreed upon had been made to the board, that the rules and working conditions

so agreed upon and the contracts based thereon were void, ordered another election held, prescribed qualifications for voting, prescribed the form of ballot to be used and authorized the selection of labor unions, as such, and system organizations of labor unions, as such, as representatives of union labor to meet the carrier in conference.

It thus appears that the *ex parte* submission which gave rise to Decision 218 did not concern the rules and working conditions which had been so adopted and accepted by all the carrier's employees, both union and nonunion, but did concern the power of the board to compel the carrier to confer with labor unions, as such, and system federations of labor unions, as such, and with such representatives as labor unions might designate even though they were not in the employ of the carrier. The carrier contended that Title III did not empower the board to compel it to confer with the character of representatives which Principles 5 and 15 prescribed or authorize the board to prescribe said principles.

The following is quoted from the opinion (the italics being ours) (Pr. Rec., 176):

"As above stated, Federation No. 90, after vainly endeavoring to have the ballots make provision for voting for an organization as representative conducted an election of employees *and thereupon ex parte submitted to the board as a dispute the question of whether the employees of a craft might designate an organization to represent them in negotiations and whether the law had been complied with in the method pursued by appellee.* Appellee answered and the dispute was orally presented by both parties to the board. Decision No. 218 points out that the contention was made and not disputed that a majority of the employees did not vote for the representatives with whom appellee conducted the negotiations, but that the company maintained since all had oppor-

tunity to vote this made no difference. As pointed out, *Decision 218 held that the company election was void because it restricted the choice of representatives to natural persons and to actual employees of the road.* * * *

It follows from the foregoing quoted from the opinion itself that the court was in error in the averments made in the opening paragraph of its statement of facts. It further appears from said quotation that *Decision 218* arose on an *ex parte* submission as to whether employees of a craft may designate an organization to *represent* them in negotiations with a carrier, and whether the law was complied with in the method pursued by appellee without the submission of a complaint, of any kind, against the rules and working conditions so adopted and in force. The board held that the carrier must meet in conference labor unions and heads of labor unions as representatives of its employees, as well as individuals not in its employ, when its union labor so directs, and though not involved the board declared the rules and working conditions which had been so agreed upon and which had been accepted and which were being conformed to by all its employees, union and nonunion alike, void.

IX.

THE BOARD IS NOT ENDOWED WITH ANY DISCRETION EXCEPT AS TO SUCH FUNCTIONS AS ARE IMPOSED UPON IT BY LAW. THE SELECTION OF CONFEREES FOR CONFERENCES IS NOT SUCH A FUNCTION.

The United States Circuit Court of Appeals reversed the decree of the United States District Court herein and remanded the cause to the District Court with directions to dismiss the bill. The District Court had construed

the controlling sections of Title III. That court held that the Labor Board was not authorized to direct or control the method of selecting representatives of employees under Section 301, or to dictate the character of such representation whether individual or organization. That court further held that the appointment, method of selection, or the character of conferees within the contemplation of Section 301 was not one of the functions delegated to the board by paragraph 4, Section 308, and that the board was without power to make the regulations prescribed in its Decision 218 on pages 8, 9, and 10. (Pr. Rec. 91.)

The Circuit Court of Appeals refused to consider or construe the controlling sections of said Title III but assumed, without justifying its assumption by reference to anything contained in said Title III, that the question involved was within a discretion conferred upon the board by law. The following is quoted from its opinion (Pr. Rec., 177):

“Whether the employees may, if they so choose, be represented by an organization as held by the board, or whether they may be represented only by individuals who were employees of the same employer as contended by appellee is not properly a question for a court. * * * But in so far as it was for the board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question, and the manner of its disposition, was for the board, no question here arising as to the board’s good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee, it is not for the court to substitute its opinion for that of the board in matters by law committed to the board.”

Thus the Circuit Court of Appeals refused to construe the language of the controlling sections of said Title III and justified reversal of said decree by arbitrarily hold-

ing that the questions involved were within the discretion of the Labor Board and that a review of its acts and doings in the premises cannot be awarded by the courts. The court does not undertake to justify the reversal of the decree of the District Court on a construction of the language of the sections involved but by a mere assumption and an unauthorized holding that the law empowers the Labor Board to act herein under a supposed discretion which is not subject to review. The Circuit Court of Appeals thus holds that the Labor Board having apparently acted in good faith as to the matter here involved its decision and orders cannot be questioned, even though they are not authorized by the act, but are rendered under an exercise of an excess or usurpation of power.

If the Labor Board is endowed with such a discretion it must be so endowed by law, either expressly or by necessary implication. Such discretion cannot be assumed. If such discretion is claimed it must arise out of the law under which it is claimed. If it does not so arise there is no discretion. To determine whether or not a discretion exists we must look to the law under which it is claimed. If such discretion is not expressly conferred thereby construction thereof may determine whether or not such discretion arises out of the act by implication. Title III neither expressly nor by implication confers any discretion upon the Labor Board as to the subject matter here involved. The Circuit Court of Appeals merely assumes that it does and, without giving any reason therefor, holds that the Labor Board is endowed with a discretion as to the questions here involved and that its acts and doings in the premises cannot be reviewed and thereupon reverses the decree of the District Court, remands the cause, and directs that the bill be dismissed.

The Circuit Court of Appeals evidently regarded the controlling question here to be "whether the employees may, if they so choose, be represented by an organization as held by the board, or whether they may be represented only by individuals which were employees of the same employer as contended by appellee." (Pr. Rec., 177.)

The court, however, refused to pass on the question, holding, as stated hereinbefore, that the law submits that question to the discretion of the board to determine, and that the court cannot substitute its opinion for the opinion of the board. In referring to representatives of employees to confer with the carrier the court had under consideration such representatives as Section 301 of Title III contemplates. No other section of the act concerns representatives of employees and conferences between representatives of employees and representatives of carriers. The court could not therefore have had any other section in contemplation. If a discretion is vested in the board to determine that employees may be represented in conferences with carriers by labor unions, and system federations of labor unions, as such, as held by the Circuit Court of Appeals it must be conferred by the express language of Section 301, or it must arise out of and under Section 301. Unless it is so conferred, or does so arise, there is no such discretion.

Section 301 is in words and figures as follows:

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, di-

rectly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

This section makes it the duty of carrier and employees *to avoid any interruption to the operation of any carrier* growing out of disputes between carrier and employee. It provides that all *such* disputes, that is, disputes which may interrupt the operation of any carrier, shall be *considered* and if possible *decided in conference* between *representatives* designated and authorized so to *confer* by the carrier or the employees or subordinate officials thereof *directly interested in the dispute*. As to such conference, and the selection of representatives therefor, the section imposes no duty upon the Labor Board. The section imposes a duty upon carrier and employee alike to settle *such* disputes as the section contemplates if it is possible to do so in conference between the *carrier* and *representatives of its employees directly interested in the dispute*. The selection of representatives for such conferences is committed to carrier and employee. As to such representatives, their selection and election, the Labor Board has no concern or duty. The last sentence of the section is as follows:

"If any dispute is not decided in such conference it shall be referred by the parties thereto to the board which under the provisions of this Title is authorized to hear and decide such dispute."

Under this section the Labor Board may acquire jurisdiction over the subject matter of such a dispute as is contemplated by the section, not settled in conference between the carrier and the representatives of its employees directly interested in the dispute, but jurisdiction over such dispute can only attach when it is "*re-*

ferred by the parties thereto" to the board. No reference of any unsettled dispute was here made to the Labor Board under Section 301. The discretion, if any, vested in the Labor Board to hear and decide such disputes as said section contemplates which have not been settled in conference between carrier and representatives of its employees, and which the carrier and representatives of its employees have jointly referred to the board to hear and decide is not involved. The disputes contemplated by said section do not include every dispute which may arise between carrier and employee, nor do they include disputes as to matters of railroad management and railroad procedure. By the language of the section disputes contemplated thereby are disputes which if settled will avoid an interruption to the operation of a carrier and concern wages, rules, working conditions and grievances growing out of the administration of the same. If under the provisions of Section 301 any discretion is conferred upon the Labor Board in hearing and deciding disputes it is, under the language of the section, only disputes which may result in an interruption to the operation of the carrier, and which the carrier and the representatives of its employees directly interested have been unable to settle in conference, and which they have jointly referred to the board for hearing and decision. It cannot be contended that a joint submission of any unsettled dispute was here referred to the Labor Board by carrier and representatives of its employees for hearing and decision under the provisions of Section 301. Therefore Circuit Judge Page, sitting in the District Court, in his opinion herein said (Pr. Rec., 139):

"The further conclusion is inevitable that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties ***.

The language of Section 307 strongly supports my conclusion upon Section 301 because Section 307 makes ample provision for intervention on the part of the Labor Board in all cases arising under the act where the carrier and the employees have failed to compose their difficulties or upon such failure to join in a submission to the Labor Board as provided in Section 301."

No other section of Title III concerns representatives of carriers and employees. No other section thereof concerns conferences between carriers and representatives of employees "directly interested in the dispute." No joint submission was here made, or attempted to be made, to the Labor Board of an unsettled dispute for hearing and decision under Section 301. It follows that the discretion, if any, conferred upon the Labor Board to hear and decide disputes jointly referred to it for arbitration under the provisions of Section 301 does not attach here. No discretion is conferred upon the Labor Board to hold that employees of a carrier may be represented in conferences contemplated by Section 301 by labor unions and system federations of labor unions, as such. The discretion, if any, vested in the Labor Board under this section does not include, attach to and cover the question here involved or authorize the palpable usurpation of power which inheres in Decision No. 218, which was condemned by Judge Page in the District Court, was not approved but excused by the Circuit Court of Appeals as being within a supposed discretion, but which alleged discretion the act does not confer upon the Labor Board expressly or by implication.

Notwithstanding the plain and apparent meaning of the language of Section 301 the Circuit Court of Appeals said (Pr. Rec., 173):

"Section 301 by its terms is applicable to any dispute between the carrier and the employees. If the

concluding sentence of the section, providing that in case the dispute is not decided in conference it shall be referred 'by the parties thereto' to the board authorized to deal with the dispute, means that unless *both* parties agree so to refer it, the board cannot in any event deal with the matter Title III might as well not have been enacted; for if the right of the board to act depended upon the joint submission of the parties to the dispute it lay in the power of either party to block utterly any action by the board, by simply refusing to join in the submission."

Evidently the Circuit Court of Appeals misapprehends the character of disputes contemplated by Section 301. In the first sentence of the paragraph just quoted the court says that Section 301, by its terms, is applicable to "any dispute between the carrier and the employee." But as stated hereinbefore Section 301 neither includes nor contemplates *any* dispute between carrier and employee, but *such disputes only* as may interrupt the operation of a carrier if unsettled. The court quotes from the section the following: "any dispute between the carrier and the employees," but omits the context thereby enlarging the meaning of the language quoted. The complete sentence from which the court so quotes is as follows (the italics being ours):

"It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means to avoid *any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof.*"

The disputes which are contemplated by the foregoing sentence are disputes which if settled will avoid interruption to the operation of carriers—not every possible dispute, important or unimportant—but such disputes only as may interrupt the operation of the carrier if not settled. Disputes which our common experience teach

us may result in the interruption of the operation of carriers are disputes which relate to wages, rules, working conditions and grievances arising out of the administration thereof. As to joint submissions under Section 301 the court says (Pr. Rec., 173) that under such construction "it lay in the power of either party to block utterly any action by the board by simply refusing to join in the submission." But Section 307 expressly provides for an *ex parte* submission to the Labor Board of any dispute involving grievances, rules, working conditions or wages which has not been decided as provided in Section 301—that is in conference, or on joint submission to the board—and which said board is required to receive for hearing and decision. Under Section 307 not only is the carrier, or its employees, authorized to make *ex parte* submissions of disputes involving grievances, rules, working conditions and wages which have not been decided in conference or under the provisions of Section 301, but the Labor Board itself is endowed with a discretion on its own motion to take jurisdiction of *such dispute* if it is of the opinion that it is *likely substantially to interrupt commerce*. Section 301 requires carriers and employees through their representatives to endeavor to settle disputes which may avoid an *interruption to the operation of a carrier*. Section 307 authorizes the Labor Board on its own motion to take jurisdiction of any dispute involving grievances, rules, working conditions and wages which is *likely substantially to interrupt commerce*. Thus the effort to ignore the plain meaning of the language of Section 301 fails, not only because of the plain meaning of the language used, but because Section 307 meets the court's criticism of Section 301 by authorizing either party to make an *ex parte* submission of disputes which in our common experience may lead to an interruption in the

operation of carriers, and thereby substantially interrupt commerce, not under a submission by the *parties*, but under *an ex parte* submission by either party. Section 301 provides for voluntary submission to arbitration. Section 307 provides for compulsory arbitration. It is not true, therefore, that it is in the power of either party "to block utterly any action by the board by simply refusing to join in the submission."

Section 307 authorizes the Labor Board upon acquiring jurisdiction of the subject matter covered by that section to receive for hearing and as soon as practicable and with due diligence decide the subject matter of dispute. If this section confers any discretion upon the Labor Board it is to hear and decide disputes submitted in accordance with and under its provisions and is confined to disputes involving grievances, rules, working conditions and wages. The section does not confer power upon the Labor Board to determine who may represent employees of a carrier in conferences contemplated by Section 301, nor does it confer power upon the Labor Board to receive and hear anything else than the things specified therein, and then only under and in accordance with its provisions.

Under Section 308 the Labor Board has a discretion as to its organization, as to meeting at other places than Chicago and as to regulations necessary for the efficient execution of the functions vested in it by Title III, but not to make regulations for the execution of functions not vested in it by this title. As said in the opinion of Judge Page in the District Court (Pr. Rec., 189):

"The appointment or method of election of referees under Section 301 was not one of the functions delegated to the board."

Title III does not authorize the Labor Board to prescribe its functions. The act prescribes its functions

The act does not authorize the board to hold that in conferences under Section 301 employees of carriers may be represented by general chairmen of labor unions, and system federations of labor unions, as such. No such power is conferred upon it and no such discretion arises under the act. To so hold is not one of the functions conferred on the board.

In Decision No. 119 the Labor Board nevertheless assumed power to compel carriers to meet in conference labor unions and system federations of labor unions, as such. That decision declared that rules and working conditions agreed upon in conference between carriers and representatives of their employees must be consistent with the principles promulgated and attached thereto as Exhibit B. (Pr. Rec., 75.) Sixteen principles were so promulgated and attached. (Pr. Rec., 84-86.) Principle No. 5 declares the right of lawful organizations to act toward lawful objects through representatives of their own choice, whether employees of a particular carrier or otherwise, and requires the carrier to agree thereto. Principle No. 15 declares that the majority of a craft or class of employees shall have the right to determine *what organization* shall represent its members in conferences or otherwise. The Pennsylvania Railroad Company refused to confer with representatives of its employees who were not in its employ, or to confer with labor unions and system federations of labor unions, as such, as representatives of its employees. It recognized a duty to meet in conference representatives of all its employees as to disputes contemplated by Title III, whether such representatives were, or were not, members of labor unions, and whether such representatives were or were not heads of labor unions, but it insisted that the law does not make it its duty to confer as

to such disputes with representatives of its employees who are not in its service and directly interested in the dispute, or with officers and heads of labor unions and system federations of labor unions, as such.

In an opinion filed by the Labor Board on September 16, 1921 (Pr. Rec., 116), the board endeavors to justify said principles as follows:

"It is a settled principle of law that under a remedial act, as this is, even where not expressly given, sufficient powers are implied to enable the purposes of the act to be accomplished. But in this instance the power is expressly given by the language of the statute, namely, 'The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title.' "

Here the board declares that its power to promulgate said principles is express and is conferred by the foregoing quotation from paragraph 4 of Section 308 of Title III. But Section 308 deals with board procedure only. Said paragraph 4 does not confer upon the board general power to make regulations but a *limited power* to make *only* such *regulations* as are "*necessary*" for the efficient execution of functions "*vested in it by this title.*" The board cannot justify its promulgation of said principles 5 and 15 by anything contained in Section 308 of Title III which section relates, as its plain language shows, only to its organization and procedure as a board. Nevertheless the board assumed to promulgate principles 5 and 15 and determined that The Pennsylvania Railroad Company had violated said principles by refusing to conform thereto, and announced as a policy, that it would withhold from any carrier or employee which refused to conform to its decisions the protection of the law upon any matter arising after such refusal.

In his opinion Circuit Judge Page, sitting in the District Court, said referring to the power of the board to direct or control the method of selecting representatives of employees (Pr. Rec., 139) : .

"It is in a general way claimed that the board has the right to direct or control the method of selecting the representatives of the employees under Section 301 under the provisions of Section 308 (4), which is as follows:

The Labor Board 'may make regulations necessary for the efficient execution of the functions vested in it by this title.'

The appointment or method of election of conferees under Section 301 was not one of the functions delegated to the board and therefore it had not the right to make the regulation provided for in Decision No. 218 on pages 8, 9 and 10. I am of opinion that the purpose of Section 301 was to leave to the carrier and its employees full liberty to get together in their own way."

Here Judge Page disposes of the contention of the Labor Board that the law confers power upon it to require carriers to meet in conference representatives of its employees who are not in its employ, or with labor unions, and system federations of labor unions, as such, holding as he does that the appointment or the method of election of conferees under Section 301 is not a function delegated to the board under the language used in said paragraph. He could have held nothing else.

Nevertheless, referring to said paragraph 4 of Section 308 the opinion of the Circuit Court of Appeals says, the italics being ours (Pr. Rec., 177) :

"It is urged for appellee that the matter of the election of representatives by the employees is wholly procedural and is something with which the board is in nowise concerned and its action in this regard was wholly beyond its jurisdiction. The force of the contention is not apparent. Title III confers on the board important duties and prescribes in Sec-

tion 308 (4) that it 'may make regulations necessary for the efficient execution of the functions vested in it by this title.' This, alone, if indeed in the very nature of things it were not necessarily so, would empower the board to make provisions for determining whether those purporting to represent disputants *before the board* do in fact so represent them."

Thus the Circuit Court of Appeals, like the board, justifies the promulgation of said Principles 5 and 15 by a section of Title III which concerns board procedure, and board procedure only. The court does not find express power to promulgate said principles as the board did but justifies them under said paragraph 4 of said section because under said paragraph the board is assumed to have a right to determine "whether those purporting to represent disputants "*before the board*" do in fact represent them, or if they cannot be so justified, by asserting that the board is so empowered "in the very nature of things." Without construing the various sections of the act which confer power upon the board, and out of which power may arise, to ascertain the source of the power claimed, the court arbitrarily refers the power to said paragraph 4. But the question here does not involve the *power* of the board to determine "whether those purporting to represent disputants *before the board* do in fact represent them" but whether the board can compel *carriers to confer with labor unions, as such, and with persons not in the employ of the carrier*, and who are not interested in the subject matter in dispute.

It follows from the foregoing, quoted from the opinion of the Circuit Court of Appeals, that power to promulgate Principles 5 and 15 does not depend alone upon a *supposed discretion* or upon paragraph 4 of Section 308, but on the "very nature of things" as well. Said paragraph 4 concerns regulations for "the efficient execution

of the functions vested" in the board by Title III. What are the functions vested in the board? They are the duties which the title imposes on the board and are set forth in Sections 301 and 307 so far as disputes between carrier and employees are concerned. As to representatives of employees and conferences with carriers the title imposes no duty. All other sections of the act concern board procedure. Under the plain language of Sections 301 and 307 the board is not empowered to act unless upon a submission to it of *such disputes as are contemplated by said sections*, by joint submission under Section 301, and upon an *ex parte* submission at the instance of carrier, employees, subordinate officials, adjustment boards, or upon the Labor Board's own motion under Section 307. The construction of the controlling sections of Title III here involved in the District Court is in accord with the plain meaning of the language thereof.

X.

TITLE III NEITHER DIRECTLY, NOR INDIRECTLY, IMPOSES LABOR UNIONS, AS SUCH, OR INDIVIDUALS NOT IN ITS EMPLOY, UPON THE CARRIER, AS CONFEREES IN CONFERENCES CONTEMPLATED BY THE ACT.

As a reason why carriers must meet labor unions and system federations of labor unions, as such, and individuals not in the employ of the carrier, as representatives of their employees in conferences, Judge Alschuler says (Pr. Rec., 178) :

"Title III in several instances recognizes representation of employees by organizations (Secs. 302, 303, 307 (a) and (b), 309, 313), and that this was largely the practice with many carriers before the Government control and generally so during Government control, the National Agreements having been so negotiated."

The National Agreements referred to by both the board and Circuit Court of Appeals were negotiated by the Director General of Railroads during federal control. The railroad companies whose properties were taken from them and were being operated by the Government were not parties to said agreements. They had no voice in the negotiation of rules, working conditions and wages provided for therein. The Pennsylvania Railroad Company had not theretofore and has not since negotiated wages, rules and working conditions for its shop crafts with labor unions or system federations of labor unions. It was an open shop railroad before federal control and upon the return of its property it continued its open shop policy and has so continued it to the present time. It denies that its right to maintain and so operate can be taken away. It denies that it can be compelled to recognize labor unions and system federations of labor unions as factors in the conduct of its business. It has not at any time closed its doors against union labor. It employs men who are possessed of the necessary qualifications for the particular work to which they aspire whether they are or are not members of labor organizations. It recognizes the right of its employees, both union and nonunion, to representation in conferences concerning matters in which its employees are interested. It insists, however, that such representatives shall be individuals directly interested in the dispute whether they are or are not members of labor unions. It will not enter conferences with men who are not in its employ, nor with labor unions and system federations of labor unions, as such, as representatives of its employees. The Pennsylvania Railroad Company denies power in Congress to constitutionally compel it to so confer. It denies that Title III contemplates that it should so confer. It denies that the act expressly, by implication or under a

discretion, authorizes the Labor Board to require it to so confer. The right to deal with individual representatives of its employees as to matters contemplated by Sections 301 and 307 is an inherent right which cannot constitutionally be taken from it, and which said Title III does not contemplate. It is true that Title III in certain sections recognizes representation of employees by organizations as asserted in the opinion of Judge Alschuler. But no section referred to in that opinion supports an inference that the law intends to compel *carriers* to meet in conference other than individual representatives of its employees who are directly interested in the subject matter before the conference. It will be noted that the court in referring to sections which recognize representation of employees by organizations does not refer to Section 301 which is the only section which concerns conferences between carrier and representatives of its employees. Section 301 specifies "carriers or the employees or subordinate officials whose members are directly interested in the dispute." It does not specify or refer to organizations of employees, labor unions, or system federations of labor unions. The court refers to Section 307 as recognizing representation of employees by organization, but the term "organization of employees" as used in Section 307 is limited to and concerns only *ex parte applications for hearings* before the board under Section 307 and has no application to Section 301. The term "organization of employees" as used in Section 307 is not contained in Section 301, and Section 307 does not concern representatives of employees for conferences, but concerns only *ex parte* applications for hearings upon subjects contemplated thereby. Section 302 is referred to but it relates only to the establishment of Railroad Boards of Adjustment by Agreement. The term "organization of employees" as used

in Section 303, also referred to, like Section 307, applies to and concerns only *ex parte* applications for hearings before the board upon matters contemplated by said section and has no application to and does not concern representatives of employees for conferences with carriers. Section 309 is inapplicable for the purpose for which the court cites it inasmuch as it merely provides that any party to any dispute to be considered by an adjustment board, or by the Labor Board shall be entitled to a hearing either in person or by counsel and nothing more. Section 313 merely authorizes publication of carrier, employee or subordinate official or organization thereof for violations of a decision of the Labor Board or of an adjustment board.

The foregoing sections, so referred to by the court, shed no light upon the question here involved. They neither show, nor tend to show, that Title III confers power on the board to compel carriers to confer with labor unions and system federations of labor unions, as such, as representatives of its employees in conferences contemplated by Section 301 rather than with individual representatives selected from its employees, both union and nonunion, nor do said sections disclose power in the board to compel carriers to confer with representatives of their employees who are not directly interested in the dispute, and who are not in their employ.

The opinion of the Circuit Court of Appeals does not arise out of a construction of Title III but is based upon an unauthorized assumption that the act confers a *discretion* upon the Labor Board to compel the carrier to confer in conferences contemplated thereby with representatives of its employees who are not in its employ, or with labor unions and system federations of labor unions, as such, rather than with

individual representatives who are directly interested in the dispute. It is insisted by The Pennsylvania Railroad Company that such discretion is not conferred by the act.

XI.

IF THE LABOR BOARD INHERITED JURISDICTION OVER DISPUTES CONCERNING RULES AND WORKING CONDITIONS IT WAS OUSTED OF JURISDICTION WHEN THE PENNSYLVANIA RAILROAD COMPANY AND ITS EMPLOYEES SETTLED SUCH DISPUTES.

It appears from the opinion of the Circuit Court of Appeals that during federal control of railroads, and prior to the passage of the Transportation Act, certain disputes were pending and undetermined respecting wages and working conditions; that immediately after the Transportation Act became a law and the railroads were returned to their owners the Labor Board was organized and said undetermined disputes were taken up for hearing and consideration; that the disputes were divided into two classes—one concerning wages and the other concerning rules and working conditions; that the board settled the dispute concerning wages (Pr. Rec., 174) but by its Decision No. 119 called on employers and employees of the various railroad systems to confer and if possible agree upon rules and working conditions; that if at the time Decision 119 was promulgated the dispute as to rules and working conditions was pending before the board it was entirely proper for the board to request the parties to confer and if possible agree without thereby losing its jurisdiction over the subject matter of the reference; that if pursuant to the request, or even without request, employers and employees should get together and agree there would then be no pending dispute as to working conditions; that *if no agreement was reached*

the dispute as to working conditions would still be within the jurisdiction of the board *just as if it had not been referred to employers and employees for settlement.* (Pr. Rec., 176, 178.) The court declares that by Decision 119 the Labor Board "called upon employers and employees of the several systems to *confer together* and if possible agree respecting" rules and working conditions. In referring the dispute as to *rules and working conditions* to employers and employees of the several systems *for conference* the board necessarily understood that such conferences could only be held under Title III of the Transportation Act—that title being a limitation upon the power of the board. Knowing that such conferences would be held under Title III the board must also have known that Section 301 was the only section which authorized and controlled such conferences—not on orders from the board—but as a duty imposed by the act upon carriers and employees and as to which the board had no duty. If as a result of such reference conferences were held, and rules and working conditions were established which were accepted and conformed to by all employees, union and nonunion alike, the dispute as to rules and working conditions would no longer exist and the alleged jurisdiction of the board as to rules and working conditions would be at an end. The dispute as to rules and working conditions having terminated it would not be material whether the representatives of the employees in conference were labor unions and system federations of labor unions, as such, or individual representatives of its employees in its service. If the representatives selected conferred with the employers and agreed upon rules and working conditions, which agreements were accepted and conformed to by all employees, union and nonunion alike, no dispute remained as to rules and

working conditions between such employers and employees and there could have been no reversion to the board of the subject matter of its reference under Decision 119. The union employees did not complain to the board against the rules and working conditions so established but conformed to them in every particular. If such rules and working conditions had been unjust, or worked any hardship, or were for any reason unsatisfactory to union employees, Section 307 authorized them, and other employees who were directly interested in the rules and working conditions so established, on *ex parte* submissions, to submit the same to the board for hearing and decision on complaints against the rules and working conditions so in force and effect, as well as against grievances arising out of the administration thereof.

Rules and working conditions having been agreed upon between The Pennsylvania Railroad Company and its employees, and such agreements having been reduced to contract, and all employees of The Pennsylvania Railroad Company having accepted the same, and having commenced work thereunder without complaint there remained no undetermined dispute between that company and its employees as to rules and working conditions and if any such dispute had theretofore been before the board for decision and determination, its jurisdiction was lost by the settlement of the dispute and the contracts entered into between the carrier and all its employees which were thereafter in full force and effect. The dispute as to rules and working conditions having been disposed of jurisdiction of such dispute could not again vest in the board.

Referring again to the board's jurisdiction over working conditions the court says (the italics being ours) (Pr. Rec., 175):

"The Transportation Act changed the law, but

it did not change the fact of the pendency of the serious dispute respecting *wages and working conditions*. The fact that the *dispute* existed long before the board was created made it none the less a *dispute cognizable by the board* if *continuing to exist after the board began to function*. It is thus apparent that at the very outset *this dispute as to rules and working conditions* was before the board, and was so treated by both parties to the *dispute*, including *appellee*. Under these circumstances it would be immaterial whether it got there by *ex parte* or *joint submission* or on the initiative of the board itself."

This is true as to the original jurisdiction, if transition from federal to company control carried such jurisdiction with it—that is as to working conditions. But working conditions were not involved under the record here, nor was any question alleged to be inherited within the foregoing quotation. The court again asserts that the dispute as to working conditions existed long before the board was created and, being an existing dispute, when the board was organized that body inherited jurisdiction to hear and decide the same. If jurisdiction was so inherited it is true that the subject matter thereof did not reach the board under the provisions of the Transportation Act either by *joint reference*, by *ex parte submission*, or on the *initiative of the board itself*. The court asserts jurisdiction in the board to dispose of such disputes if the disputes "*continued to exist after the board began to function*," from which we infer that the jurisdiction of the board to hear and settle said dispute ceased when such disputes were settled whether by the board or directly by the parties interested. Having been settled the jurisdiction of the board ceased because the dispute ceased. If thereafter another dispute should arise as to rules and working conditions between the same employer and its employees the board could not take jurisdiction thereof as an inherited dispute but

could only acquire jurisdiction of the same as provided by said Title III, by joint reference, by *ex parte* submission to the board or on the initiative of the board itself. But the agreement between the employer and employees as to rules and working conditions, and the action of union and nonunion employees alike, in conforming to the same settled the dispute and the jurisdiction of the Labor Board over the subject of rules and working conditions was at an end. The inherited dispute as to rules and working conditions having been settled by contracts covering rules and working conditions, jurisdiction thereover was gone forever. The alleged dispute, here involved, which the court had before it did not arise as an inherited dispute as to *rules and working conditions*, but on an *ex parte* submission of said questions, admitting that rules and working conditions had been agreed upon but complaining that labor organizations, as such, were not recognized in selecting representatives to confer with the carrier. Of this question the board had no jurisdiction, either inherited or under Title III. Therefore the force of the foregoing quotation from the opinion "is not apparent." No complaint against the rules and working conditions so negotiated, agreed upon and conformed to by all employees on the lines of The Pennsylvania Railroad Company was ever made to the board, and no such complaint is involved. It does appear by the board's Decision 218 (Pr. Rec., 92) that the federated shop crafts of the Pennsylvania System by B. M. Jewell, president of the Railway Employees' Department of the American Federation of Labor, made an *ex parte* submission to the board of three questions as follows:

1. Has a majority of the employees of any craft on the Pennsylvania System the right to designate an organization to represent said employees in negotiating an

agreement with the carrier covering rules and working conditions?

2. Has a majority of the employees of such craft the right to be represented in such negotiations by anyone other than an employee of said carrier?

3. Has the carrier complied with the law in the method pursued by it to ascertain who are representatives of the shop employees with whom it shall negotiate rules?

These *ex parte* questions, so submitted to the board, not inherited by it, are responsible for Decision No. 218. (Pr. Rec., 92.) But Title III does not authorize the board to take jurisdiction of *such ex parte* inquiries, to render decisions thereon and to publish carriers for refusing to comply therewith. If it assumes to do so it acts under a usurpation of power. *Ex parte* submissions can be made under Section 307—but only as to matters there specified. Such specification includes wages, rules and working conditions and grievances arising out of the administration thereof. The foregoing questions are not, nor is either of them, within said section and such *ex parte* submission did not confer jurisdiction upon the board to render any authoritative decision thereon. The questions so submitted included no complaint against the rules and working conditions agreed upon and then in force. No suggestion of injustice, of hardship, or of grievance arising out of such rules and working conditions was submitted to the board for determination by said questions, or either of them. It was not denied that rules and working conditions had been agreed upon and were then in full force and effect on the lines of The Pennsylvania Railroad Company. The submission did not complain against the justness of said rules and working conditions so agreed upon and the board in declar-

ing, as it did, in said Decision 218 that the rules negotiated between the representatives selected and the railroad company are void and of no effect was guilty of a usurpation of power and in threatening to publish the company under Section 313 unless it submitted to the decision was guilty of the exercise of such excess of power as to merit condemnation in the courts rather than protection.

It is apparent from the questions so submitted that the heads of the labor unions Mr. Jewell represented were not complaining against said rules and said working conditions but were interested in their own official supremacy and union control. Each question so submitted looks to the recognition of labor unions, as such, as the representatives of union employees in conferences between the carrier and its employees. Inasmuch as no complaint was made by employees under Section 307, as was authorized, or by the chief executive of any organization of employees as there authorized, against the rules and working conditions established and then in force the attitude of the Labor Board in taking jurisdiction of said submission should be condemned instead of upheld under a supposed discretion which the courts cannot control.

XII.

THE BILL ALLEGES, AND THE MOTIONS TO DISMISS ADMIT, THAT THE LABOR BOARD DETERMINED THAT THE PENNSYLVANIA RAILROAD COMPANY HAD REFUSED TO CONFORM TO ITS DECISION 218 AND THEREUPON ORDERED PUBLICATION AGAINST SAID COMPANY UNDER SECTION 313. THE RAILROAD COMPANY THEN FILED ITS BILL TO ENJOIN SUCH PUBLICATION ON THE GROUND THAT DECISION 218 WAS NOT WITHIN THE POWER OF THE BOARD TO RENDER. THE ADMISSION PRECLUDES THE SUGGESTION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS THAT THE MOTION TO VACATE DECISION 218 IS STILL PENDING BEFORE THE BOARD.

The following is quoted from the opinion of the Circuit Court of Appeals (the italics being ours) (Pr. Rec., 178-179) :

"That the question whether the employees have in fact consented to the rules and working conditions which appellee announced is still pending before the board. In its last order made on petition of appellee to set aside Decision No. 218 the board granted the petitioner's request to present its views on certain questions, among them as to how the representative capacity of those representing unorganized labor shall be ascertained and of the adoption or ratification of appellee's rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class. An early date for that hearing was set but it does not appear that it has taken place, the next action shown of record being the filing of the bill herein."

The hearing in the District Court was upon bill, motions to dismiss, a so-called answer, which Judge Page said (Pr. Rec., 135) was no more than a statement of grounds urged for dismissal, and exhibits which appear in the record. For the purpose of the hearing in the Dis-

trict Court, in the Circuit Court of Appeals, and here, the material facts alleged in the bill and not denied by answer are taken as true. The bill alleges that rules and working agreements were negotiated with representatives of its employees and that such rules and working conditions were accepted and complied with by union and nonunion labor alike (Pr. Rec., 22, 24). This allegation is nowhere denied in the record and the motions to dismiss the bill concede the allegation to be true.

It is alleged in the foregoing quoted from the opinion that The Pennsylvania Railroad Company announced rules and working conditions to control upon its system of railroad. The court does not, however, refer to the fact that the record shows that the rules and working conditions so announced were negotiated between the carrier and representatives of its employees, and that the rules and working conditions so negotiated, agreed upon and conformed to by its said employees terminated the pending dispute as to rules and working conditions. (Pr. Rec., 22, 24.) It does not appear by the so-called answer or any exhibit appearing of record herein that *any complaint was ever made to the Labor Board against the rules and working conditions so adopted.* The question whether the employees of The Pennsylvania Railroad Company consented to the rules and working conditions so negotiated and in force was not submitted to the Labor Board. Complaints by *ex parte* submission *against the rules and working conditions so negotiated* could have been but were not submitted. The Circuit Court of Appeals was not justified, in the light of the record, in asserting that the question whether or not the employees of The Pennsylvania Railroad Company had consented to the rules and working conditions so negotiated was still pending before the board. That

question never was submitted to the board and the averment in the opinion of the court that the question was still so pending is absolutely without foundation in the record.

It is also alleged in the foregoing quoted from the opinion that the last order of the Labor Board made on petition of The Pennsylvania Railroad Company to set aside Decision No. 218 granted the petitioner's request to present its views on certain questions, among them as to how the representative capacity of those representing unorganized employees should be ascertained, and of the adoption or ratification of appellee's rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class, and that though an early date for hearing thereon was set it had not taken place and the next action of record was the filing of the bill herein.

On September 16, 1921, the Labor Board filed its opinion on the petition of The Pennsylvania Railroad Company requesting the Labor Board to vacate and set aside its Decision No. 218 (Pr. Rec., 106). The board in that opinion grouped the points contained in the petition to vacate into eight heads and considered the same *seriatim*. Said heads are in substance as follows (Pr. Rec., 116-121):

1. Protest against the extension of the National Agreements.
2. Protest against the power of the board to adopt the principles set out and attached to Decision 119.
3. Protest against the statement in the decision that "there is no question of the closed or open shop involved in this dispute and no other real matter of principle."
4. Announcement that the carrier intends to follow its own plan in deciding upon the qualifications of em-

ployees to vote, and that it is its right to prescribe and limit the qualifications of employees to vote by eliminating those not in actual service at the time including employees laid off or furloughed at the time of election.

5. Announcement that it has been the policy of the carrier to establish and maintain employee representation since the termination of federal control.

6. That Section 6 of the petition contains a somewhat vague statement to the effect that the employees' representatives have recently signified their approval of the agreements negotiated with carrier.

7. Asserts that the agreements entered into with employees in its shop crafts are in full force and effect and that the parties have acquired mutual rights thereunder and that their abrogation would work a great injury to both carrier and employees.

8. That the employees who are not parties to the contract and who do not want to be bound thereby may invoke the aid of the board.

The foregoing represent the contents of the petition to vacate Decision 218, as appears in the decision of the board. The order of the board upon the petition to vacate authorized the carrier to present its views on the following matters (Pr. Rec., 122):

“1. The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements on rules and working conditions.

2. The question of how the representative capacity of the spokesmen of unorganized employees shall be ascertained.

3. The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class.”

The board declined to grant a rehearing upon the questions of substance raised in the carrier's petition.

In the quotation from the opinion of the Circuit Court of Appeals, *supra*, it is alleged that the board granted the petitioner's request to be further heard (a) on the question of how the representative capacity of those representing unorganized labor shall be ascertained, (b) and on the question of the adoption or ratification of said rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class.

But The Pennsylvania Railroad Company did not request a rehearing on the question of how the representative capacity of those representing unorganized labor should be ascertained. The board states (Pr. Rec., 118) that in its petition for vacation the carrier announced its right and its intention to determine for itself qualifications which will entitle employees to vote, and further announced that it is its right to prescribe and limit the qualifications of employees to vote by eliminating those not in actual service at the time but who are laid off or furloughed at the time of the election. The question of how the representative capacity of those representing unorganized labor should be ascertained was not a question presented by The Pennsylvania Railroad Company in its petition for vacation of Decision 218. Upon the contrary The Pennsylvania Railroad Company refused to submit that question to the Labor Board, or any question relating to the qualifications of employees to vote. In saying that the board granted the petitioner's request to present its views upon the question of the representative capacity of those representing unorganized labor, and how such representatives should be selected the record shows that the Circuit Court of Appeals is in error as

to the fact. Such question was not within the petition to vacate as is shown by said decision of the board.

In the said quotation, *supra*, the Circuit Court of Appeals also ascribes to the petitioner a request to be heard further upon the question of the adoption or ratification of said rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class. The decision of the board upon said petition to vacate shows (Pr. Rec., 120-121) that the carrier declared that the agreements entered into with its employees in its shop crafts were in full force and effect and that the parties had acquired mutual rights thereunder and that their abrogation would work a great injury to both carrier and employees. That if any employees who were not parties to the said agreement did not desire to be bound thereby they should invoke the aid of the board. The record shows that the board denied the petition of The Pennsylvania Railroad Company to be further heard on any matter of substance involved, but granted it the right to be further heard as to matters of procedure over which the board had no jurisdiction. (Pr. Rec., 122.) The board thus authorized the carrier to present its further views on the question of what employees, if any, not in the actual and active service of the carrier should be permitted to vote in the election of representatives to negotiate agreements, rules and working conditions concerning which the board had no duty, power, or discretion, and also upon the question of how the representative capacity of the spokesmen of unorganized labor might be ascertained concerning which the board had no duty, power, or discretion, and also to offer such evidence as it might see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by

a majority of the employees of that class concerning which the board had no duty, power, or discretion.

In its said application to vacate the carrier denied the power of the board to dictate an election or to prescribe any rule by which the carrier should determine who were the authorized representatives of its employees and refused to submit itself to the jurisdiction of the board by submitting further argument relative to the subject matter of said paragraphs 1 and 2. (Pr. Rec., 24.)

That as to paragraph 3 of said decision the carrier averred in its said application to vacate, that rules and working conditions had been negotiated, and had been agreed upon between the carrier and the representatives of approximately 150,000 of its employees and the carrier denied there and denies here the right or power of the board to set such agreements aside. (Pr. Rec., 24, 25.)

Here the carrier averred that the subject matter of said paragraph 3 related to mere procedure and it denied power in the board to dictate procedure. The carrier avers in its bill herein (Pr. Rec., 24) that said decision refused the carrier's request for an oral argument upon the matters of substance urged in the carrier's said application to vacate but granted it as to procedure. The carrier, however, declined to be heard upon questions of procedure and management, over which the board was not authorized by the Transportation Act to assume jurisdiction, which were the only questions the board opened to it for further argument on its said application to vacate. (Pr. Rec., 24.)

It is averred in the bill of complaint that the order of the board entered on the carrier's application for vacation of Decision 218 was not responsive thereto, or to

the matters and things therein contained; that the said board refused to grant a hearing on said application at which the carrier might show that the great majority of its employees were satisfied with the manner in which employee representatives were selected and with the rules and working conditions negotiated between such representatives and the carrier but said board authorized a further hearing restricted to matters over which the carrier maintained that the board was without jurisdiction. Therefore it declined to be further heard. (Pr. Rec., 25.)

It is further averred in the bill herein (Pr. Rec., 26) that the Labor Board determined under Section 313 of Title III that the action of the carrier in refusing to conform to the terms of said Decision 218 was a violation of said decision and that it would publish the carrier in such manner as would seriously and irreparably injure the property of the plaintiff.

In view of all the foregoing facts, not denied in the record, the Circuit Court of Appeals was in error in saying that the question as to whether the employees of The Pennsylvania Railroad Company were satisfied with the rules and working conditions so negotiated was still pending before the board; that though The Pennsylvania Railroad Company was authorized to be heard further upon Decision 218 it had not availed itself of the opportunity; and that no further hearing had taken place. *The record shows that the carrier refused to be further heard upon the questions which the board authorized it to be heard upon and that thereafter the board determined and announced a purpose to publish the carrier for refusal to conform to the provisions of Decision No. 218.* (Pr. Rec., 26.) Such determination by the board precludes the suggestion that questions growing out of

the carrier's petition to vacate are still pending before the board.

XIII.

THE CONSTITUTIONAL QUESTION RAISED BY THE PLEADINGS IS PERTINENT AND WELL TAKEN. THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE SAME.

Upon the question of the constitutionality of Title III, in the first paragraph of the opinion, the Circuit Court of Appeals says (the italics being ours) (Pr. Rec., 171-172) :

"Appellee contends that if Title III makes the decisions of the Labor Board binding upon the carriers, and enforceable by appropriate proceedings, it is unconstitutional. Suffice it to say, there is not here involved any proceeding for the enforcement on the carrier of a decision of the board as to wages or working conditions. Indeed, the action of the board most complained of by appellee was in furtherance of securing an agreement between the carriers and their employees, with the probable alternative that if ultimately they fail to agree, the board itself will decide upon and prescribe rules and working conditions. If and when this stage is reached, and one or both of the parties refuse to obey the board's decision, it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties."

Appellee has not and does not here contend "that if Title III makes the decisions of the Labor Board binding upon carriers, and enforceable by appropriate proceedings, it is unconstitutional." The averment is not justified by the record. The Pennsylvania Railroad Company has not refused to conform to any decision of the board which Title III authorizes. It does insist that a decision of the board which is not authorized is not

binding either upon carrier or employee. It contends that under Title III the Labor Board cannot dictate the character of conferees for conferences contemplated by Section 301 and compel the carrier to confer with labor unions, as such, with system federations of labor unions, as such, or with representatives of employees, selected by labor unions, who are not in the actual service of the carrier, and are therefore not interested in the wages, rules and working conditions to be negotiated in such conference. The Pennsylvania Railroad Company contends that the foregoing concern matters of railroad management and procedure which are not subject to control by the Labor Board. It recognizes a duty, under Title III, to confer with its employees in negotiating rules and working conditions, and requested its employees, union and nonunion alike, to select individual representatives from among their numbers to meet it in such a conference. The officers of Federated System No. 90, however, refused to permit its members to vote for individual representatives and ordered them to vote for said federated system as their representative. The carrier refused to confer with Federated System No. 90, as such, but did confer with such individual representatives of its employees, union and nonunion alike, as were elected representatives and with such representatives negotiated rules and working conditions which were accepted by all its employees, and against which rules and working conditions neither union, nor nonunion employees, complained to the board. The officers of said federated system of labor unions, however, together with B. M. Jewell, President of the Railway Employees' Department of the American Federation of Labor, upon their own initiative submitted, *ex parte*, certain inquiries to the board as to whether or not a carrier can refuse to confer with labor unions, as such, and whether or not a

carrier can confine representation for such conference to individuals to be selected from persons actually in the service of the carrier. The Labor Board, though Title III did not confer power upon it to do so, conducted a hearing on said *ex parte* questions, and rendered an unauthorized decision thereon, No. 218 (Pr. Rec., 92) holding that carriers must confer with heads of labor unions and system federations of labor unions, as such, in conferences contemplated by Title III, and with representatives selected by such organizations, whether or not such representatives were in the actual employ of the carrier and interested in the subject matter of the conference. On the hearing The Pennsylvania Railroad Company contended that Title III neither directly nor indirectly authorized said decision.

The contention of The Pennsylvania Railroad Company as to the constitutionality of Title III is shown by the following paragraphs quoted from the bill of complaint (Pr. Rec., 28) :

“Plaintiff avers that if upon consideration of said Transportation Act and said Title III, and upon a construction of said Title III, and each section thereof, it should be held by this Honorable Court that in and by the terms of said act said board has power to hold that said election, and the said rules and working conditions negotiated by the employees’ representatives, so elected, and the carrier, were respectively illegal, void and of no effect, said Title III of said Transportation Act and each section thereof is unconstitutional and repugnant to the Fifth Amendment to the Constitution of the United States.”

(Pr. Rec., 29) :

“Plaintiff avers that if upon construing said Title III this honorable court should hold that said Labor Board was authorized by said title to assume jurisdiction over the subject of procedure and railroad

management by requiring the carrier and its employees to hold another election, and to hold contracts made by it void and of no effect, and, in the event of failure on the part of the carrier to comply with the decision of the board entered under such assumed authority, to exercise the coercive and plenary powers granted to it by Section 313, then said Title III and each and every section thereof is unconstitutional and repugnant to Section 1 of Article I of the Constitution of the United States; to Section 1 of Article III of the Constitution of the United States, and to the Fifth, Sixth and Seventh Amendments to the Constitution of the United States."

The Pennsylvania Railroad Company did not contend, as is charged in the foregoing quotation, "that if Title III makes the decisions of the Labor Board binding upon carriers and enforceable by appropriate proceedings it is unconstitutional." The record shows that The Pennsylvania Railroad Company did contend that the act was unconstitutional if it was intended thereby to confer power upon the board to invalidate contracts which had been entered into with its employees and which were being conformed to, without complaint, by all its employees, union and nonunion, alike. It was insisted, however, by The Pennsylvania Railroad Company that said Title III did not so empower the Labor Board. The bill of complaint (Pr. Rec., 28) expressly denies that said Title III or any section thereof authorized said board to declare said election illegal and the rules and working conditions so negotiated void and of no effect.

Thus the only decisions of the Labor Board which The Pennsylvania Railroad Company has refused to follow are its Decisions 119 and 218, which seek to control the selection of conferees for conferences, under Section 301 of said title, and to declare void contracts covering rules and working conditions negotiated with its employees,

union and nonunion alike, and with which its employees were satisfied, and against which no complaint was made. The Pennsylvania Railroad Company contends that if Title III authorizes the Labor Board to dictate the character of conferees to negotiate rules and working conditions and authorizes the board to declare contracts negotiated with its employees, with which both parties are satisfied, void, said title is unconstitutional. From the foregoing quotation it would appear that The Pennsylvania Railroad Company resists all decisions of the Labor Board, and contends that if any decision of the Labor Board is binding upon it, and enforceable, the act is unconstitutional. It does not so contend. Such averment is without an atom of support in the record. As a reason why the Circuit Court of Appeals declined to pass upon the constitutionality of the act the opinion says (Pr. Rec., 171-172):

"Suffice it to say there is not here involved any proceeding for the enforcement on the carrier of a decision of the board as to wages or working conditions."

But Decision 218 declares the rules and working conditions so negotiated, and in force, void. Such decision the board promulgated. It determined to publish the carrier under Section 313 because it refused to submit to the decision—that is, refused to give up acceptable rules and working conditions, and under procedure prescribed by the board, to negotiate other rules and working conditions, in lieu thereof. It would seem that by said decision, and the subsequent determination of the board to enforce the same, the constitutionality of the act is made pertinent. The force of the court's suggestions is not apparent.

The following is quoted from the opinion and follows the foregoing quotation (Pr. Rec., 171-172) :

"Indeed, the action of the board most complained of by appellee was in furtherance of securing an agreement between the carrier and their employees with the probable alternative that if ultimately they failed to agree the board itself will decide upon and prescribe rules and working conditions."

But the record here shows that an agreement was entered into between the carrier and its employees as to rules and working conditions which was satisfactory to all its employees, union and nonunion alike, and against which no complaint was made to the board. Therefore there was no possible alternative that the board could be called upon to prescribe rules and working conditions, acceptable rules and working conditions having been agreed upon and being then in force and effect.

If Title III authorizes the board to declare contracts covering rules and working conditions void the constitutionality of the act, in so far as it so authorizes, is a pertinent question. Its consideration cannot be deferred until the board itself has fixed rules and working conditions to which one or both of the parties decline to conform. To declare existing rules and working conditions void invites inquiry as to the power of the board to so declare. If the language of the act authorizes it to do so its constitutionality may be challenged by a party injured and the question is apt for determination.

It appears from the printed record (pages 28-29), where the allegations charging the unconstitutionality of Title III will be found, that the contention does not rest alone upon the asserted power to declare rules and working conditions negotiated and reduced to contract, void, but also on the assumed power to set aside elections, as well as the rules and working conditions negotiated

thereunder, and to compel carrier and employees to hold a second election for representatives under the provisions of said principles 5 and 15, to negotiate agreements and contracts between carrier and employees in lieu of the agreements and contracts it had declared invalid. Decision No. 218 declared the election of conferees for said conferences void because the carrier refused to recognize as eligible to election labor unions, as such, system federations of labor unions, as such, and individuals dictated by unions who were not in the employ of the carrier. The decision declared the election void. It ordered another election to be held and declared labor unions, as such, system federations of labor unions, as such, and individual representatives not in the employ of the carrier to be eligible to election as conferees. The bill herein averred that Title III did not authorize the board to determine eligibility to election as conferees but that if said title did so authorize, the act was unconstitutional. Decision 218 first declares the election at which said representatives were elected void. If the act authorized the board to so declare it is unconstitutional. Decision 218 secondly declares rules and regulations negotiated by the representatives selected in said election void. If the act authorized the board to so declare, it is unconstitutional. The Circuit Court of Appeals cannot justify its refusal to meet the constitutional question presented on the theory that the question does not involve "the enforcement on the carrier of a decision of the board as to wages or working conditions." The board does undertake to enforce upon the carrier *its decision* that said election was void as well as *its decision* that the rules and working conditions so negotiated were void. The decision was the board's decision. The carrier denies its authority in the premises

under the provisions of Title III and asserts that such authority cannot be constitutionally conferred. The constitutional question was pertinent under a decision holding that the board was endowed with a discretion to render and enforce its Decisions 119 and 218. A discretion cannot be exercised which is not a constitutional discretion.

The Circuit Court of Appeals declares that the application for increase in wages and changes in rules and working conditions descended to the Labor Board on termination of Federal control. That these applications, called disputes, the board divided into two parts—one as to wages and the other as to rules and working conditions. That Decision No. 2 fixed wages for carrier to pay. That the subject of rules and working conditions was to be disposed of thereafter. That some of the rules and working conditions materially affect wages. That The Pennsylvania Railroad Company was a party to the proceedings before the board which indicated that the company regarded the whole subject matter as before the board (Pr. Rec., 174) for determination. But The Pennsylvania Railroad Company did not concede jurisdiction to the board over the subject of rules and working conditions at any time. This appears from Board Decision 218, to which the Circuit Court of Appeals says (Pr. Rec., 174) "verity must be accorded." The following is quoted from Decision 218 (Pr. Rec., 94):

"The carrier further contends that the board had not acquired jurisdiction in a lawful manner over the dispute regarding rules and working conditions when Decisions No. 2 and No. 119 were rendered."

Thus from this board decision it appears that the carrier, though present, protested against the jurisdiction of the board over the national agreements and the subject of rules and working conditions, some of which

the Circuit Court of Appeals declares "*materially affect wages*," in which statement the court is supported by Labor Board Decision No. 2 (Pr. Rec., 48), and again by its Decision 119 (Pr. Rec., 71), where the board says that:

"There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages."

Petitioner contends that said title does not confer power upon the board to nullify contracts covering rules and working conditions, some of which materially affect the wages of employees (Pr. Rec., 174), entered into by the parties, which are in full force, and which are satisfactory to both the carrier and its employees. If it does confer such power petitioner contends that the act is unconstitutional and void. If it does not confer such power petitioner does not complain against its constitutionality. If some of the rules and working conditions "materially affect wages," to that extent contracts covering rules and working conditions cover wages as well. To invalidate such contracts is to interfere with the private right of contract, concerning which Judge Pitney said in his dissenting opinion in *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755:

"This act in my judgment usurps the right of the owners of the railroads to manage their own properties and is an attempt to control and manage the properties rather than to regulate their use in commerce. In particular it deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point I need only refer again to *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436."

The Circuit Court of Appeals holds that said title confers power upon the board to set aside contracts cover-

ing rules and working conditions, some of which "materially affect wages," under a discretion arising out of and under the act. Therefore the court is in error in saying:

"there is not here involved any proceeding for the enforcement on the carrier of a decision of the board as to wages or working conditions."

What the court here says is not involved is the particular thing which is involved—the enforcement upon not only the carrier, but upon the employees as well, of a decision of the board invalidating agreements covering rules and working conditions "materially" affecting "wages." The Circuit Court of Appeals thereupon says that when the board undertakes to enforce upon the carrier a decision as to rules or working conditions "it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties." Decision No. 218 was such a decision and the right to enforce it was the question pending in the Circuit Court of Appeals—a decision declaring satisfactory contracts covering rules and working conditions, "materially affecting wages," null and void. The constitutional question was therefore before the court under the exact conditions which the court held would make the question pertinent.

The foregoing quotation from Justice Pitney, dissenting in *Wilson v. New*, embodies the law. The principal opinion by Chief Justice White recognizes the law to be as announced by Justice Pitney with the qualification that where a general strike of railway employees has been ordered, Congress has the inherent power to standardize wages for a limited time to be fixed by the act, during which term carriers and employees may agree upon wages and by doing so suspend the operation

of the law, even before it expires by its own limitation.

The following is quoted from the opinion of Chief Justice White in *Wilson v. New, supra* (the italics being ours):

"It is also equally true that as the right to fix by agreement between the carrier and its employees a *standard of wages* to control their relations is *primarily private*, the establishment and giving effect to such agreed on *standard* is not subject to be controlled or prevented by public authority. But taking all these propositions as undoubted, if the situation which we have described and with which the act of Congress dealt be taken into view—that is, the dispute between the employers and the employees as to a *standard of wages*, their failure to agree, the resulting absence of such *standard*, the *entire interruption of interstate commerce which was threatened*, and the infinite injury to the public interest which was imminent—it would seem inevitably to result that the power to regulate *necessarily obtained* and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a *standard of wages* to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted."

Herein Chief Justice White declares an inherent power in Congress to temporarily standardize wages as a necessity when carriers and employees cannot agree and when because of the absence of such *standard*, an *entire interruption of interstate commerce is threatened* and infinite injury to the public interest is imminent.

Again Chief Justice White said (the italics being ours):

"But this was not a *permanent fixing*, but, in the

nature of things, a *temporary one* which left the will of the employers and employees to control *at the end of the period* if their dispute had then ceased."

Wilson v. New, 243 U. S. 332, 61 L. Ed. 755, cited by Judge Page, does not sustain the constitutionality of the sections of Title III here involved. On the contrary *Wilson v. New* is conclusive that Congress itself is not vested with inherent power to do what Section 307 of said Title undertakes to confer power upon the Labor Board to do. That the decision of the court as to the constitutionality of the Adamson Act was an emergency decision is apparent, not only from the language of the Adamson Act, but from the decisions of the courts which uphold the act as an emergency act, made necessary by the *general strike* of railroad employees *called throughout the United States* looking to a suspension of all commerce. The inherent power which the court asserts inheres in Congress to standardize wages is confined to emergencies such as faced the country when the Adamson Act was enacted, covering what Chief Justice White designates as an *interregnum* during which wages might be standardized by act of Congress *for such reasonable time* as might be regarded sufficient to enable the carrier and employees to agree as to wages and working conditions. Power to standardize wages for all time, or except in cases of emergency similar to that which existed when the Adamson Act was passed, was not declared in *Wilson v. New*. Upon the contrary the opinion upholds the Adamson Act on the doctrine of necessity, and confines Congress in passing such acts to emergencies like unto that which then existed, and then only for such period of time as Congress might think necessary to enable normal conditions to return, which period Chief Justice White designates as an "in-

terregnum." In Section 307 of said title power is professedly conferred upon the Labor Board to prescribe wages, rules and working conditions on an *ex parte* submission by either carrier or employee, not temporarily, but without any limitation. Thus Congress has assumed to confer upon the Labor Board power which under *Wilson v. New*, Congress itself does not possess.

In his opinion in *Wilson v. New*, Chief Justice White considers and determines the power of Congress to deal with the subjects embraced in the Adamson Act.

In the opening paragraph he says that the question involved is a question of power in Congress *under the circumstances existing* to deal with the hours of work and wages of railroad employees engaged in interstate commerce.

Again he says, the italics being ours:

"Did Congress have power, under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide a permanent eight-hour standard and to create by legislative action a standard of wages to be operative upon the employer and employees for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages? Or, in other words, did it have the power in order to prevent the interruption of interstate commerce to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling for the limited period provided for?"

Again the opinion says (351), the italics being ours:

"And finally to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being completely stopped by filling

the *interregnum* created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a *legislative standard* binding on employees and employers for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties.

We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power the act which is before us was clearly within the legislative power of Congress to adopt and that in substance and effect it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between the parties by establishing as to the subject matter of that dispute a legislative *standard of wages* * * *."

As to the permanency of the standard of wages established the opinion says (p. 356), the italics being ours:

"But this was not a permanent fixing, but, in the nature of things, a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased."

Again as to the permanency of the standard of wages fixed by the law the opinion says, the italics being ours:

"It certainly cannot be said that the act took away from the parties, employers and employees, their *private right to control* on the subject of a scale of wages, since the power which the act exerted was *only exercised because of the failure of the parties to agree* and the resulting necessity for the law-making will to supply the *standard* rendered necessary by such failure of the parties to exercise their *private right*."

Again on the subject of the permanency of the standard of wages the opinion says, the italics being ours:

"From this it also follows that there is no founda-

tion for the proposition that *arbitrary action* in total disregard of the *private rights* concerned was taken, because the right to *change or lower the wages* was left to be provided for by agreement between the parties after *a reasonable period which the statute fixed*. This must be unless it can be said that to afford an opportunity for the exertion of the private right by agreement as to the *standard of wages* was in conflict with such right."

Concluding, the opinion upholds the power of Congress to adopt the act in question whether it be viewed as a direct fixing of wages to meet the absence of a *standard on that subject* resulting from the dispute between the parties or as the exertion by Congress of the "power which it undoubtedly possessed to provide by appropriate legislation for *compulsory arbitration*, a power which inevitably resulted from its authority to protect interstate commerce in *dealing with a situation like that which was before it*."

The opinion in *Wilson v. New* was adopted by a 5 to 4 vote. Five justices declared that Congress had power to fix a *temporary* standard of wages during the period provided for by the Adamson Act. Four justices declared that under no emergency could Congress take from the parties the right to contract and compel them to submit to a standard of wages prescribed by Congressional enactment.

It is important in analyzing Chief Justice White's opinion to note that he says concerning the standard of wages fixed by the Adamson Act (pp. 356-357), the italics being ours:

"But this was not a permanent fixing, but, in the nature of things, a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased."

And again he says (p. 351) that the Government has

power to prescribe a standard of wages to fill the *interregnum* created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and the employees, by a legislative standard binding on employers and employees *for such time as the legislature might deem reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties.*

It follows from the foregoing quotations that the court in upholding the standard of wages fixed by the Adamson Act did so because of an alleged inherent power to *temporarily fix a standard during*

"the interregnum created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties."

While declaring an inherent power in Congress to so provide for such an interregnum the opinion also declares that it is

"true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

The opinion recognizes the private right under all circumstances to contract and agree even during the period of time for which the legislature has prescribed a standard of wages, and only recognizes an inherent power in Congress to fix a standard of wages for such limited period of time as is considered by the legislature sufficient to enable the re-establishment of normal conditions and standards of wages by such private contract.

The court holds:

1. That where a general strike of railway employees has been ordered by reason of a failure to agree upon a standard of wages, Congress may fix a standard working day for employees engaged in interstate commerce.

2. Under such circumstances Congress may establish a *temporary standard of wages as was done by the Adamson Act.*

The conclusions reached in the opinion rest entirely upon emergency.

Justice Holmes concurred in the opinion and subsequently wrote the opinion in *Ft. Smith & Western Railroad Company et al. v. Mills, Receiver, etc.* 253 U. S. 206, 64 L. Ed. 862, which was a suit to enjoin the receiver of the Ft. Smith & Western Railroad Company from conforming to the Adamson Act in respect of hours of service and wages and to enjoin the Federal district attorney from proceeding to enforce that act. An injunction was awarded. Concerning the Adamson Act, Justice Holmes said, the italics being ours:

"The act in question known as the Adamson Law was passed to meet the emergency created by the threat of a general railroad strike."

Justice Holmes also said, concerning the Adamson Act, the italics being ours:

"But the statute avowedly was enacted in haste to meet an emergency and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required"

The foregoing extracts from the opinion in *Wilson v. New*, declaring the inherent power to temporarily fix a standard of wages to apply during an *interregnum*, recognize the act to be an *interference with private*

rights and the decision does not, as Justice Holmes says, extend beyond the purpose of the enactment.

The opinion in *Wilson v. New*, upholding the constitutionality of the Adamson Act, is conclusive of the unconstitutionality of certain sections of Title III of the Transportation Act. Title III provides a board to which carrier and employee are *ordered* to submit matters contemplated by the act, not otherwise determined, *for decision*. This includes disputes involving grievances growing out of the administration of rules, working conditions, and wages and authorizes the board to standardize wages, to decide all disputes as to rules and working conditions, and to settle any and all disputes involving grievances growing out of the administration of rules and working conditions without regard to threatened commercial interruptions. *Wilson v. New* only recognizes an inherent power to *standardize wages during an interregnum*, to prevent the cessation of all interstate commerce and for no other purpose. When the power of Congress to pass the Adamson Act was being considered, the power was upheld as a mere temporary expedient. If Congress has inherent power to standardize wages *temporarily* only it cannot *delegate* power to a board to standardize wages *permanently*. If Congress has inherent power to temporarily standardize wages, even if it can delegate an inherent power, it cannot delegate a greater power than it can exercise, which the court confines to a standardization of wages during an interregnum.

Section 307 (a) and (b) provides that the Labor Board may take jurisdiction of and with due diligence decide any dispute involving grievances, rules, working conditions or wages which has not been decided as provided in Section 301 if the board is of the opinion that the dispute is *likely substantially to interrupt commerce*.

In his opinion Chief Justice White says that the Adamson Act was passed to *save the country from commercial disaster, property injury, and the personal suffering of all, not to say starvation.* Title III professes to confer power upon the board upon *its own motion to fix wages, rules and working conditions* if *in its opinion the dispute is likely substantially to interrupt commerce.* The Adamson Act was a legislative enactment to standardize wages for a temporary period. Wages fixed by the board on its own motion or on the *ex parte* submission of the carrier or its employees are not for a temporary period. The fixing by the board is authorized if the board is of the opinion that the dispute is *likely substantially to interrupt commerce.* In standardizing wages under the act *the board legislates.* It does not report its conclusions to *Congress for action* but *standardizes upon its own motion* and is authorized to legislate along lines not open to Congress. To cover the situation which existed when the Adamson Act became law congressional action was absolutely necessary. The Labor Board here would supersede Congress with authority to fix rules, working conditions and wages at any time on an *ex parte* submission, or on its own motion if of opinion that the dispute was likely substantially to interrupt commerce.

The power of Congress to adopt a temporary standard of wages is held to be an inherent power and the inherent power to adopt said standard is limited to an interregnum during which carrier and employee may adjust their differences. This inherent power is a limitation upon Congress. Congress cannot pass an act prescribing a standard of wages which shall apply to the exclusion of agreements of the parties. Even while a standard provided by Congress is in effect the parties

may by agreement ignore the standard so prescribed and conduct their relations under contracts entered into by the parties. Notwithstanding the power to so standardize wages inheres in Congress and cannot therefore be delegated, Congress nevertheless by Title III has undertaken to confer upon a board powers which Congress does not possess, namely, power to take the question of grievances, rules, working conditions and wages out of the hands of the parties at the request of either carrier or employee and pass the same up to a commission of nine men to decide. Thus Title III authorizes a board to fix rules, working conditions and wages, not temporarily but permanently, a power which, under the opinion in *Wilson v. New*, Congress itself does not possess.

In his dissenting opinion in *Wilson v. New*, Justice Day said concerning the Adamson Act:

"Such legislation it seems to me amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal rights which the Constitution intended to secure in the due process clause to all coming within its protection and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat."

It is apparent that said title violates the spirit of fair play and private rights under the due process clause of the Federal Constitution, usurps the right of the railroads to manage their own property and deprives the carrier of its right to agree with its employees as to the terms and conditions of their employment. Said title of the Transportation Act is not justified by anything said in *Wilson v. New*, but is condemned by the logic, reasoning and the language of said opinion and goes be-

yond any power which is there inherently declared to exist in Congress.

It is insisted that the decree of the District Court perpetually enjoining the Labor Board, and the members thereof, from assuming any authority, or taking any action of any kind or character under Section 301 of the Transportation Act, "unless and until" there has been a joint submission to the board of a dispute by the carrier and employees, and from making publication of any matter based upon action taken by the board under said Section 301, without a joint submission thereof having been made to the board as required by said section, should be affirmed. To sustain the reversal of said decree would be to approve the usurpations which gave rise to this suit and to declare that the sections of Title III of the Transportation Act, here involved, are constitutional.

Frank J. Loesche
Timothy J. Dwyer
Robert F. Lincoln

Solicitors for Petitioner.

C. B. HEISERMAN,
E. H. SENEFF,
Of Counsel.

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WM. R. STAN

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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 585

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,

vs.

UNITED STATES RAILROAD LABOR BOARD, R. M.
BARTON, G. W. W. HANGER, BEN W. HOOPER,
ARTHUR O. WHARTON, WALTER L. McMENIMEN,
HORACE BAKER, JOHN H. ELLIOTT, ALBERT
PHILLIPS AND SAMUEL HIGGINS,

Respondents.

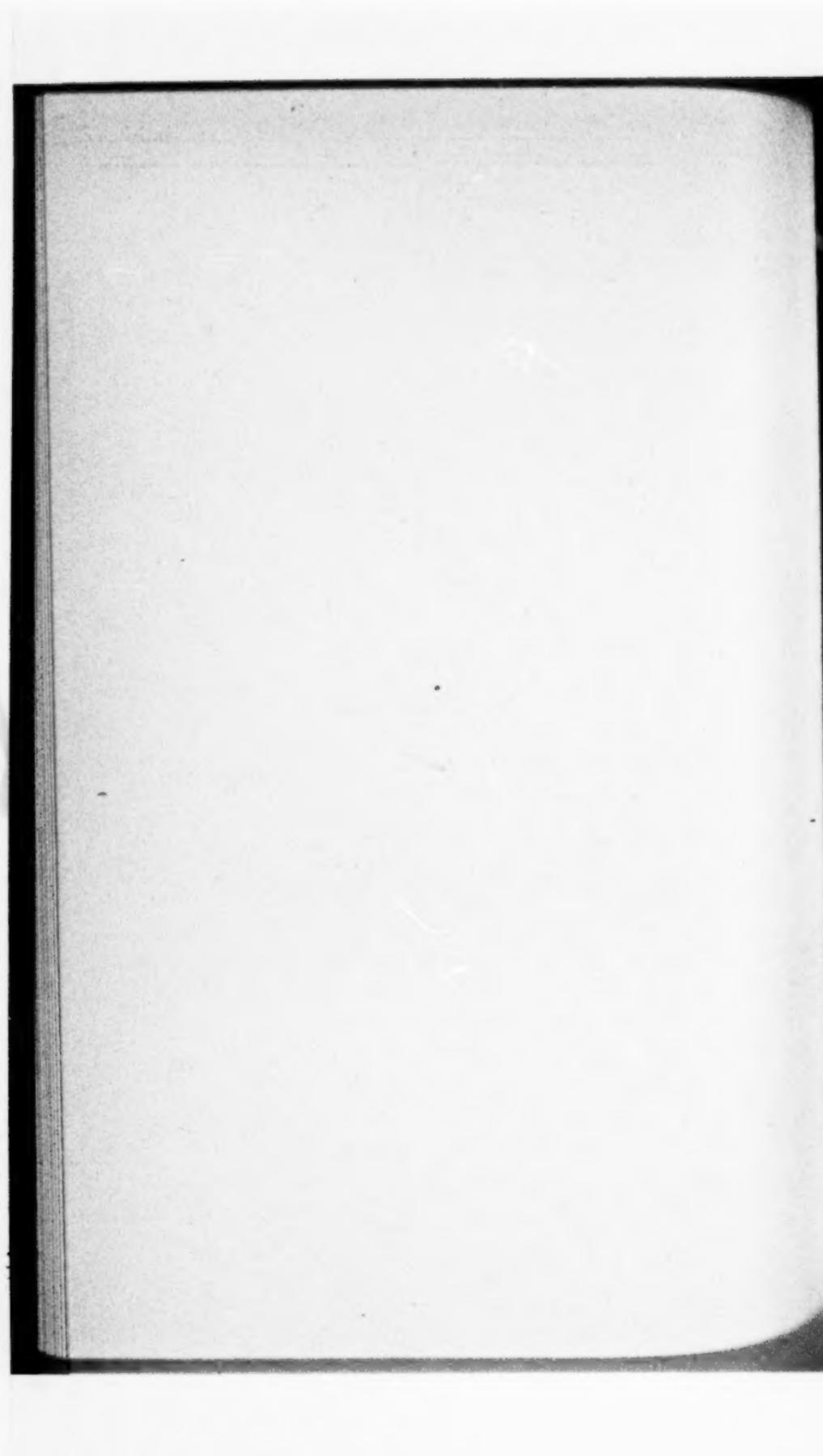
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

MOTION REQUESTING THE COURT TO TREAT THE PETITION FOR
CERTIORARI HEREIN AS HAVING BEEN FILED OCTOBER 18,
1922, OR IN LIEU THEREOF THAT PETITIONER BE PERMITTED
TO ATTACH THE WRITTEN SIGNATURE OF ITS COUNSEL TO
ONE OF THE PRINTED COPIES OF THE PETITION FOR CER-
TIORARI HEREIN AND THAT THEREAFTER THE COURT TREAT
SAID PETITION FOR CERTIORARI AS HAVING BEEN FILED
OCTOBER 18, 1922.

FRANK J. LOESCH,
TIMOTHY J. SCOFIELD,
CHARLES F. LOESCH,
ROBERT W. RICHARDS,
Counsel for Petitioner.

C. B. HEISERMAN,
General Counsel,
The Pennsylvania Railroad Company.

E. H. SENEFF,
General Solicitor,
The Pennsylvania Railroad Company.



IN THE
Supreme Court of the United States.

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THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner.

vs.

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON, G. W. W. HANGER, BEN W.
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McMENIMEN, HORACE BAKER, JOHN H. EL-
LIOTT, ~~ALBERT PHTLLEIPS~~ and SAMUEL
HIGGINS,

Respondents.

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PERMITTED TO ATTACH THE WRITTEN SIGNATURE OF ITS
COUNSEL TO ONE OF THE PRINTED COPIES OF THE PETI-
TION FOR CERTIORARI HEREIN AND THAT THEREAFTER
THE COURT TREAT SAID PETITION FOR CERTIORARI AS
HAVING BEEN FILED OCTOBER 18, 1922.

The Pennsylvania Railroad Company, petitioner in
the above entitled cause, moves the court to treat the

petition for certiorari herein as having been filed October 18, 1922, or in lieu thereof that it be permitted to attach the written signature of its counsel to one of the petitions which was in the custody of the clerk of this court on the 18th day of October, 1922, and that thereafter the court treat the petition for certiorari herein as having been filed October 18, 1922.

Frank J. Loeser
Timothy J. Scoville
Charles J. Loeser
Robert D. Liles
Attorneys for Petitioners

BRIEF STATEMENT OF THE FACTS AND OBJECT OF THE MOTION.

On October 18, 1922, there were in the custody of the clerk of this court thirty copies of the petition for a writ of certiorari herein containing the printed signatures of attorneys for petitioner, together with letters signed in writing by the attorneys for petitioner directing the clerk to file the same.

The time to file said petition expired on October 19, 1922.

On October 18, 1922, the clerk of this court addressed a letter to petitioner's attorneys at Chicago, Illinois, post marked at Washington, D. C., October 19, 1922, 8 A. M., notifying said attorneys at Chicago, Illinois, that he had no original of said petition on file and requesting said attorneys to send him a properly signed original at their earliest convenience, but did not in said letter inform said attorneys that said thirty printed copies of said petition had not been filed. In response to said letter petitioner's attorneys forwarded to said clerk an additional copy of said petition bearing the signature in writing of one of petitioner's attorneys, which said petition was received by the clerk of this court on October 26, 1922; that thereupon the clerk filed the said thirty printed copies with printed signatures which were in his custody on October 18, 1922, together with said copy received by him containing said written signature, as of October 26, 1922.

Petitioner has diligently searched the rules and decisions of this court and has been unable to find any direc-

tion therein requiring petitions for certiorari to be signed in writing by the attorneys for the petitioner as distinguished from petitions with the printed signature of attorneys admitted to practice in this court.

Rule 20, Rules of Practice in this court, concerns printed arguments, and requires such arguments to be signed by attorneys or counsellors of this court.

Rule 6, Rules of Practice in this court, concerns motions, and requires all motions to be reduced to writing.

Neither Rule 20 nor Rule 6 nor any other rule or decision that petitioner has been able to find requires attorneys for petitioner to sign such petitions in writing as distinguished from a printed signature as a condition to filing the same in the office of the clerk of this court.

Rule 6 applies to motions. It does not apply to petitions for writs of certiorari. If Rule 6 has any application to proceedings for certiorari it can only be after the petition has been filed, and then only to the motion by the petitioner that the writ issue.

Even if it be considered better practice for the attorney for petitioner to sign petitions for certiorari in writing, neither by rule nor decision, so far as petitioner has been able to ascertain, is such a signature indispensable to the consideration of a petition for certiorari.

In view of the fact that on October 18, 1922, within the time fixed by law for filing the petition for certiorari herein, petitioner had delivered to the clerk of this court thirty printed copies of said petition for certiorari as required by Rule 37 of this court as construed by petitioner, together with written direction to the clerk to file said petitions for certiorari, petitioner's good faith

in the premises is manifest, and it ought not to be deprived of the opportunity of submitting its petition for certiorari herein inasmuch as the practice, as understood by the clerk of this court, has not heretofore been made certain by any rule or decision of the court, so far as petitioner is able to ascertain.

No other question was involved which caused the clerk to file said petitions as of October 26, 1922.

Frank J. Hoesch
Timothy J. O'Gorman
Charles T. Lough
Robert C. Lincoln
 Attorneys for Petitioner.

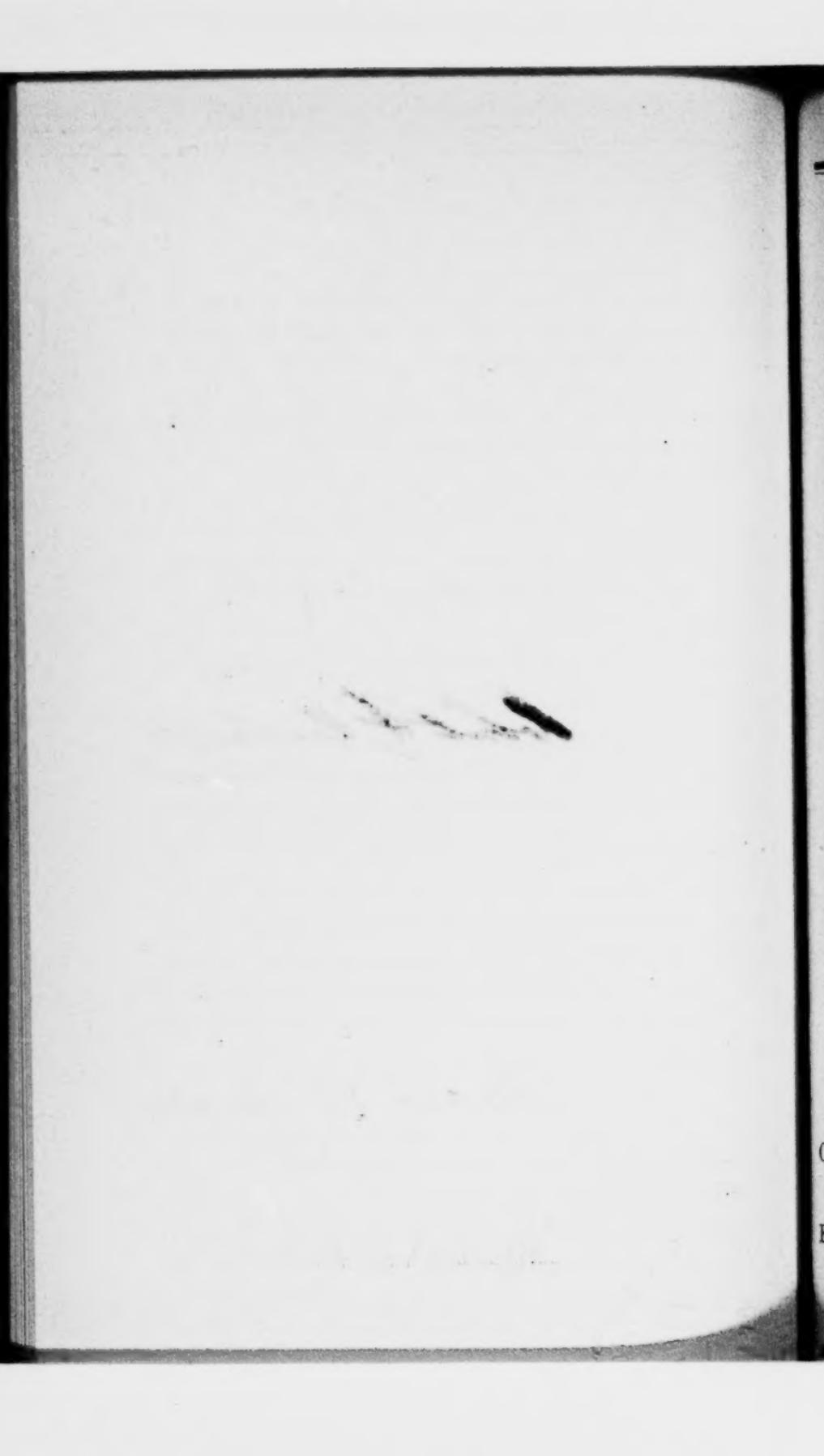
STATE OF ILLINOIS, { ss.
 COUNTY OF COOK.

EDWARD M. BURKE, being first duly sworn, deposes and says that he is the agent of the petitioner, duly authorized to make this affidavit in its behalf, and that the matters of fact contained in the foregoing statement of facts are true.

Edward M. Burke

Subscribed and sworn to before me, this 6th day of November, A. D. 1922.

Michael J. Haberkorn
 Notary Public.



FILED

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WM. H. STANSBURY
OLER

IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1922.

No. 585

THE PENNSYLVANIA RAILROAD COMPANY,
Petitioner,
vs.

UNITED STATES RAILROAD LABOR BOARD,
R. M. BARTON, G. W. W. HANGER, BEN W.
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Respondents.

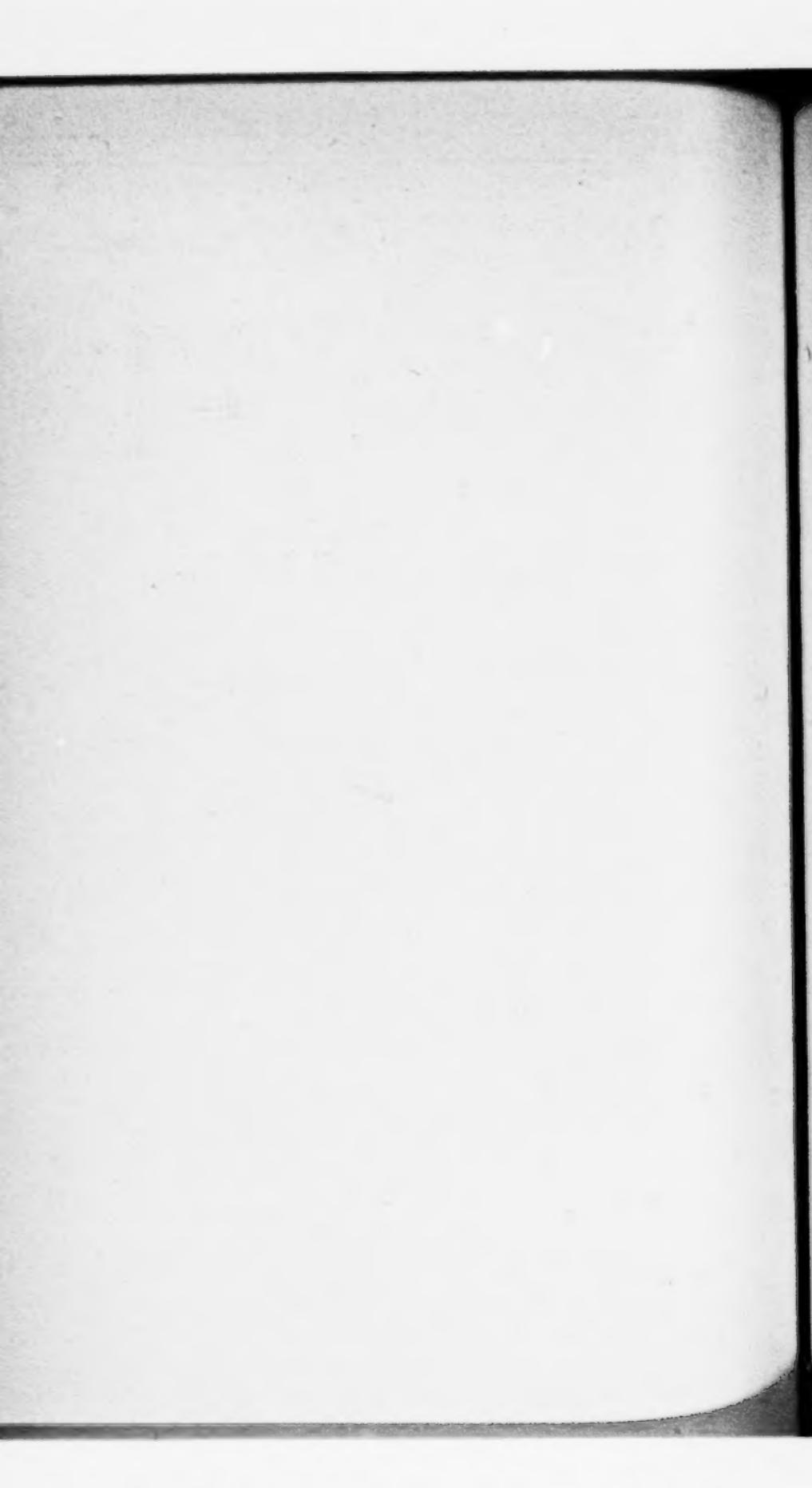
PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUBMISSION OF PETITION FOR A WRIT OF CERTIORARI IN
THE ABOVE ENTITLED CAUSE.

FRANK J. LOESCH,
TIMOTHY J. SCOFIELD,
CHARLES F. LOESCH,
ROBERT W. RICHARDS,
Counsel for Petitioner.

C. B. HEISERMAN,
General Counsel,
The Pennsylvania Railroad Company.

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The Pennsylvania Railroad Company.



IN THE
Supreme Court of the United States.
OCTOBER TERM, A. D. 1922.

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THE PENNSYLVANIA RAILROAD COMPANY,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES
CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

SUBMISSION OF PETITION FOR A WRIT OF CERTIORARI IN THE ABOVE ENTITLED CAUSE.

The Pennsylvania Railroad Company hereby submits its petition for a writ of certiorari in the above entitled cause and moves the court to issue such writ as prayed for in its petition herein.

Frank J. Hough
Henry J. Dodge
Robert T. Nichols

Attorneys for Petitioner.

C. B. HEISERMAN,
E. H. SENEFF,

Of Counsel.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PENNSYLVANIA RAILROAD COMPANY

appellant and petitioner,

v.

UNITED STATES RAILROAD LABOR BOARD,

R. M. Barton, G. W. W. Hanger, Ben

W. Hooper, A. O. Wharton, W. L.

McMenimen, Horace Baker, J. H. Elliott,

Albert Phillips, Samuel Higgins, ap-

pellees and respondents.

No. 585.

APPEAL FROM, AND WRIT OF CERTIORARI TO, UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF FOR APPELLEES AND RESPONDENTS.

I.

STATEMENT.

This is an appeal from, and a writ of certiorari to, the Circuit Court of Appeals to reverse the final decree of that court (Circuit Judges Baker, Alschuler and Evans concurring) which reversed, with directions to dismiss the bill of complaint (Tr. 167-179, 180, *Railroad Labor Board v. Penn. R. R. Co.*, 282 Fed. Rep. 701), the final decree of the District Court (Circuit Judge Page) who issued a permanent injunction against the Railroad Labor Board and its members (Tr. 145-147; *Penn. R. R. Co. v. Railroad Labor Board*, 282 Fed. Rep. 693).

II.

THE FACTS.

In January, 1919, approximately 2,000,000 railway employees comprehended in more than 1,000 classifications (Tr. 45) made demand on the Director General of Railroads for further wage increases aggregating some \$800,000,000. Because of the approaching termination of Federal Control the Director General declined to act (Tr. 44).

On February 28, 1920, the Transportation Act became effective. The Railroad Labor Board created by Title III of that Act¹ was organized April 15, 1920. The parties themselves, through their representatives, having failed to reach an agreement, the entire dispute, "what shall constitute just and reasonable wages and working conditions on these carriers" (Tr. 42), passed from the Director General to the Railroad Labor Board, *ab ovo usque ad mala*.

On July 20, 1920, by Decision No. 2 (Tr. 42), after a hearing between the various organizations therein named and practically all of the carriers, including the Pennsylvania Company, the Labor Board increased the wages by an amount estimated approximately at \$600,000,000 per annum.² The questions involving rules and working conditions were separ-

¹ Appendix A.

² In *Ex parte 74, Increased Rates* (58 I. C. C. 220, 231), the Interstate Commerce Commission found that one of the important factors which necessitated the increases prescribed by their report and order was this wage award.

In *Wisconsin Rate Case*, 257 U. S. 563, and *New York Rate Case*, 257 U. S. 591, by Mr. Chief Justice Taft, the report and order of the Commission prescribing those rate increases were sustained.

ated from the wage question, "both parties to the controversy having indicated it to be their judgment and wish," the basic reason being that the "existing conditions" which required the board to make an early decision on the wages did not prevail as to rules and working conditions³ (Tr. 48).

On December 18, 1920, the parties who were still embroiled in controversy were notified to appear before the Labor Board for a hearing beginning on January 10, 1921, on "rules and working conditions" and "the continuance of the national agreements." The carriers took the view that "the matter of continuing the national agreements," etc., previously promulgated by the Director General, "shall be handled by negotiation between the management and employees of each individual railway." The organizations arranged for the presentation, about May 1, 1920, to each carrier of a request for the continuance of the national agreements, and such requests were thereafter made on each carrier. Conferences on such requests were denied by the officers of the carriers in general on the ground "that the matter had been referred to the Labor Board for decision" (Tr. 71).

³ The Labor Board assumed that the then existing rules would continue in force and effect until changed; thus (Tr. 48):

"The board assumes as the basis of this decision the continuance in full force and effect of the rules, working conditions, and agreements in force under the authority of the United States Railroad Administration. Pending the presentation, consideration, and determination of the questions pertaining to the continuation or modification of such rules, conditions, and agreements no changes therein shall be made except by agreement between the carrier and employees concerned. As to all the questions with reference to the continuation or modification of such rules, working conditions, and agreements, further hearings will be had at the earliest practicable date and decision thereon will be rendered as soon as adequate consideration can be given."

On April 14, 1921, the Labor Board filed Decision No. 119 (Tr. 69) by which it directed that the so-called national agreements relating to rules and working conditions should, on July 1, 1921, cease and terminate. The Board continued the national agreements, rules, etc., in force as a modus vivendi. This course was accepted, acquiesced in, and acted under, by practically all of the parties before the Board (Tr. 109.) The Labor Board also called on the officers and system organizations of employees to designate representatives to confer and decide their pending dispute as to working conditions. The Labor Board reserved the right to stay the termination of national agreements if the carriers should delay progress of negotiations (Tr. 75).

On July 26, 1921, the Board published Decision No. 218. During all of this time the Railway Employees Department, American Federation of Labor,⁴ and the Pennsylvania System were before

⁴ In Decisions Nos. 2 and 119 the Labor Board lists, among other organizations, Railway Employees Department, American Federation of Labor; International Association of Machinists; International Alliance of Sheet Metal Workers; Brotherhood of Railway Carmen of America; International Brotherhood of Electrical Workers; International Brotherhood of Boiler Makers; and International Brotherhood of Blacksmiths, Drop Forgers and Helpers, as employees' organizations.

Members of the six latter organizations constitute the Federated Shop Crafts. In *United States v. Railway Employees*, 283 Fed. Rep. 479, 481, Judge Wilkerson said:

"The bill names as defendants Railway Employees' Department of the American Federation of Labor, International Brotherhood of Blacksmiths, International Alliance of Amalgamated Sheet Metal Workers, International Brotherhood of Boiler Makers, Iron Shipbuilders and Helpers of America, Brotherhood of Railway Carmen of America, International Association of Machinists, and International Brotherhood of Electrical workers, all of which are voluntary labor organizations, and the last six of which are known as the federated shop crafts comprising a division of the American Federation of Labor, numerous branches of said federated shop crafts throughout the United States which are known as system federations, Bert M. Jewell, John Scott, and other individuals, who are also sued as members of the executive council of the railway department of the American Federation of Labor."

the Board, who had persistently admonished them to agree on rules and working conditions (Tr. 92).

From Decision No. 218 it appears that the Board had refrained from hearing the dispute on rules and working conditions until the parties had exhausted all possible means of getting together.

It is also observable that the Association of Railway Executives,⁵ in February, 1920, appointed repre-

⁵ The Official Guide of the Railways and Steam Navigation Lines of the United States, a railway publication published during this period, contains on the opening pages thereof the following:

ASSOCIATION OF RAILWAY EXECUTIVES.

Thomas De Witt Cuyler, chairman; Alfred P. Thom, general counsel; B. Gordon Bromley, treasurer; Robert S. Binkerd, assistant to the chair-

man.
General offices, 61 Broadway, New York City; office of general counsel, 320 Munsey Building, Washington, D. C.; personal office of chairman, 701 Commercial Trust Building, Philadelphia, Pa.

STANDING COMMITTEE: Thomas De Witt Cuyler, chairman; E. N. Brown, chairman of the board, St. Louis-San Francisco Railway Co., Pere Marquette Railway Co.; B. F. Bush, president Missouri Pacific Railroad Co.; H. E. Byram, president Chicago, Milwaukee & St. Paul Railway Co.; W. R. Cole, president Nashville, Chattanooga & St. Louis Railway Co.; Howard Elliott, chairman Northern Pacific Railway Co.; S. M. Felton, president Chicago Great Western Railroad Co.; W. H. Finley, president Chicago & North Western Railway Co.; W. J. Harahan, president Chesapeake & Ohio Railway Co., Hocking Valley Railway Co.; Charles Hayden, chairman of the board, Chicago, Rock Island & Pacific Railway Co.; J. M. Herbert, president St. Louis Southwestern Railway Co.; Hale Holden, president Chicago, Burlington & Quincy Railroad Co.; Howard G. Kelley, president Grand Trunk Railway System; Julius Kruttschnitt, chairman of executive committee, Southern Pacific Co.; E. E. Loomis, president Lehigh Valley Railroad Co.; L. F. Loree, president Delaware & Hudson Co.; Robert S. Lovett, chairman executive committee, Union Pacific System; George R. Loyall, president Norfolk Southern Railroad Co.; N. D. Maher, president Norfolk & Western Railway Co.; C. H. Markham, president Illinois Central Railroad Co.; E. J. Pearson, president New York, New Haven & Hartford Railroad Co.; Samuel Rea, president Pennsylvania System; Bird M. Robinson, president American Short Line Railroad Association; W. L. Ross, receiver and president Toledo, St. Louis & Western Railroad Co.; T. M. Schumacher, president El Paso & Southwestern System; A. H. Smith, president New York Central Lines; W. B. Storey, president

sentatives of the carriers to confer with representatives of the organizations on the then pending request for wage increases (Tr. 70).

As their meeting in March, 1920, the representatives of the carriers declined to request authority to preserve until September, 1920, the so-called national agreements (Tr. 71).

On April 16, 1920, the entire dispute, no agreement having been reached, was referred to the Labor Board (Tr. 71).

On May 3, 1920, the chairman of the Association of Railway Executives informed organizations that the Association had taken action that the matter of continuing national agreements "shall be handled by negotiation between the management and employees of each individual railway," and "this recommendation" had been conveyed "to all the member roads of the Association." (Tr. 71).

Atchison, Topeka & Santa Fe Railway Co.; Alfred P. Thom, general counsel, Association of Railway Executives; W. H. Truesdale, president Delaware, Lackawanna & Western Railroad Co.; F. D. Underwood, president Erie Railroad Co.; H. Walters, chairman of the board, Atlantic Coast Line Railroad Co.; Daniel Willard, president Baltimore & Ohio Railroad Co.

LAW COMMITTEE: Alfred P. Thom, general counsel (chairman), Association of Railway Executives; M. L. Bell, vice president and general counsel, Chicago, Rock Island & Pacific Railway Co.; J. P. Blair, general counsel Southern Pacific Co.; S. T. Bledsoe, general counsel Atchison, Topeka & Santa Fe Railway Co.; E. H. Boles, vice president and general counsel Lehigh Valley Railroad Co.; George F. Brownell, vice president and general counsel Erie Railroad Co.; Joseph M. Bryson, general counsel Missouri, Kansas & Texas Railway Co.; E. G. Buckland, vice president and general counsel New York, New Haven & Hartford Railroad Co.; C. W. Bunn, vice president and general counsel Northern Pacific Railway Co.; J. H. Carroll, assistant to president Northern Pacific Railway Co.; Robert J. Cary, general counsel New York Central Lines; H. W. Clark, general counsel Union Pacific System; George B. Elliott, vice president and general counsel Atlantic Coast Line Railroad Co.; Francis I. Gowen, general counsel Pennsylvania System; Burton Hanson, general counsel

On May 1, 1920, the organizations arranged to present to each carrier a request for the continuance of the national agreements, and such requests were thereafter made on each carrier; conferences were denied by the officers of the carriers in general on the ground that the matter had been referred to the Labor Board for decision (Tr. 70, 71).

On May 24, 1921, the Pennsylvania Company representatives refused to negotiate with the duly elected chairmen or officers of System Federation No. 90 (composed of members of the six shop crafts and affiliated with the Railway Employees Department of the American Federation of Labor), claiming there was not satisfactory proof that the latter represented a majority of the employees in question. The Company representatives then announced that *they* had already prepared and proposed to send out a ballot upon which the shop craft employees should designate their representatives (Tr. 92, 93).

Chicago, Milwaukee & St. Paul Railway Co.; A. H. Harris, vice president, finance and corporate relations, New York Central Lines; C. B. Heiserman, general counsel Pennsylvania System; E. C. Henderson, general counsel St. Louis-San Francisco Railway Co.; Eppa Hunton, jr., president Richmond, Fredericksburg & Potomac Railroad Co.; W. S. Jenney, vice president and general counsel (in charge of legal department) Delaware, Lackawanna & Western Railroad Co.; A. R. Lawton, vice president Central of Georgia Railway Co.; Blewett Lee, New York counsel Illinois Central Railroad Co.; E. C. Lindley, vice president and general counsel Great Northern Railway Co.; W. H. Lyford, vice president and general counsel Chicago & Eastern Illinois Railroad Co.; S. W. Moore, general solicitor Kansas City Southern Railway Co.; S. C. Neale, counsel Pennsylvania System; Walter C. Noyes, general counsel Delaware & Hudson Co.; William Church Osborn, 170 Broadway, New York City; A. C. Rearick, counsel Chesapeake & Ohio Railway Co.; Theodore W. Reath, general counsel Norfolk & Western Railway Co.; James B. Sheehan, general counsel Chicago & North Western Railway Co.; O. M. Spencer, general counsel Chicago, Burlington & Quincy Railroad Co.; E. J. White, vice president and general solicitor Missouri Pacific Railroad Co.; H. T. Wickham, vice president and general counsel Chesapeake & Ohio Railway Co.

The employees' representatives objected to that ballot, claiming that the System Federation *did* represent a majority of the employees in the shop crafts, which the carriers did not deny; that the proposed ballot failed to permit employees to vote for an organization and required them to designate individuals who must be employees of the Pennsylvania Company, and that the employees must be represented regionally rather than from the railroad system as a whole (Tr. 93).

The Pennsylvania Company representatives declined to allow the employees to vote for an organization, and the officers of System Federation No. 90 then refused to approve the ballot (Tr. 93).

The latter then issued a ballot of their own. In supplemental notices they warned the employees against voting the Company ballot and called upon them to vote for System Federation No. 90. The ballot gave the employees the choice to vote for the System Federation or any other organization they might prefer, but not for an individual (Tr. 93).

The majority of the employees in the shop crafts did not vote for the representative whom the carriers had recognized and with whom it was conducting negotiations (Tr. 94). The representatives of the company admitted before the Labor Board that, exclusive of the Altoona shops, only 3,480 men voted, out of 33,104 entitled to vote, for the alleged representatives who are now negotiating rules; only 10.5 per cent of these employees are represented in these negotiations, and 85.5 per cent are virtually disfranchised (Tr. 97.)

While admitting this, the Pennsylvania Company answered that it was immaterial whether a majority of all of the employees expressed a preference for these representatives since they all had an opportunity to vote; moreover, that the Labor Board had not acquired jurisdiction in a lawful manner over the dispute regarding rules and working conditions when Decisions No. 2 and 119 were rendered (Tr. 94).

On the ground that the Pennsylvania Company had no more right to control an election of the employees in the selection of their representatives than the employees had the right to control the election of the Pennsylvania Company in the selection of its representatives, the Labor Board found that "Neither election, as held, was fair and legal" (Tr. 97, 98).

In order to break the deadlock resulting from this interminable dispute, the Board then prescribed a ballot allowing the employees the choice of voting (by secret ballot, Tr. 103) for System Federation No. 90, or American Federation of Railroad Workers, or for representation by individuals, or by any other organization (Tr. 100). The Board further directed that after the ballots had been canvassed the results should be reported to the Board and representatives of the carrier and the employees shall "proceed with the negotiation of rules" (Tr. 101).

In Decision No. 218, July 26, 1921 (Tr. 92), the Board directed that a conference be held between the representatives of the Company and those of the employees concerned, on or before August 10, 1921,

to complete arrangements for the election for which the Board had prescribed the ballot (Tr. 99). On the last day of this period the company asked for 15 days' extension within which to hold the conference, which the Board promptly granted. Concerning the course of conduct of the representatives of the Pennsylvania Company on that subject, the Board found (Tr. 114, 115):

The time having been fixed in the first place to enable both parties to hold said conference and arrange for said election, the extension of time was granted for the same purpose. It appears, however, that the time so granted has not been used for the purpose intended, that the conference directed has not been held, and that no steps have been taken to enable the employees to select their representatives as required by the law and ordered by the board. On the contrary, the entire 30 days have been consumed by the carrier in the active promulgation of propaganda, at an enormous expense to its stockholders, in which the issues involved in this controversy have been misstated and the action and position of the Railroad Labor Board grossly misrepresented.

As the end of the 30 days granted by the board approached, the carrier filed its application to the board to vacate and set aside Decision No. 218. In this application the carrier says, in effect, and in its outside propaganda in express words, that it will not abide by the decision of the board in this matter unless said decision sets the seal of its approval on the carrier's conduct.

On September 16, 1921, the Labor Board filed its decision which resulted in the commencement of the suit (Tr. 105). From that decision it appears that "on January 31st (1921) the Chairman of the Labor Committee of the Association of Railway Executives, a Vice-President of the Pennsylvania System, appeared before the Board and urged that it at once take action, and, among other things, decide and declare the national agreements, et cetera, terminated; that the question of reasonable rules and working conditions be remanded to negotiations between each carrier and its own employees; and that, as a basis for negotiations the agreements, rules, and working conditions in effect as of December 31, 1917, be reestablished" (Tr. 110). The Board declined to do so on the ground that the Pennsylvania Company had previously recognized the jurisdiction of the Board over (1) the continuation or termination of the national agreements, and (2) rules and working conditions.

III.

THE PROCEEDINGS IN THE COURTS BELOW.

Without attaching complete copies as exhibits or otherwise, but by alleging disconnected excerpts or fragments of its then published decisions, the bill of complaint assailed the action of the Labor Board in making and publishing further decisions which the Pennsylvania Company anticipated might be adverse to it. The defendants filed a motion to dismiss (Tr. 33). Subsequently, they filed an answer (Tr. 35-39). In pursuance of Equity

Rule 29⁶ they set up separate defenses; and as the Sixth Defense, duly certified copies of the several decisions referred to in, or assailed by, the bill, which were attached to the answer as exhibits (Tr. 38). In considering these exhibits the District Court said: "What the board did is shown in the exhibits filed, and the only authority therefor is found in Title III of the transportation act" (Tr. 135).

The District Court overruled the motion (Tr. 144) with an opinion. The cause then came on for final hearing "on the bill, motion to dismiss, answer, and exhibits thereto, all of which are considered and made a part of the record" (Tr. 146), and on May 4, 1922, the District Court finally decreed (Tr. 145, 146) that the Railroad Labor Board and its members—

* * * be and hereby are perpetually enjoined in manner and form as follows:

(1) From assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act, unless and until there has been a joint submission of a dispute by the carrier and the employees, which has been the subject matter of conference between them.

⁶ Demurrers and pleas are abolished. Every defense in point of law arising upon the face of the bill, whether for misjoinder, nonjoinder, or insufficiency of fact to constitute a valid cause of action in equity, which might heretofore have been made by demurrer or plea, *shall be made by motion to dismiss or in the answer*; and every such point of law going to the whole or a material part of the cause or causes of action stated in the bill may be called up and disposed of before final hearing at the discretion of the court. Every defense heretofore presentable by plea in bar or abatement shall be made in the answer and may be separately heard and disposed of before the trial of the principal case in the discretion of the court. * * *

(2) Upon such joint submission the Board may proceed to hear and determine disputes only under and in accordance with the general provisions of Title III of the Transportation Act.

(3) From making publication of any matter based upon action taken by the Board not in harmony with Item I thereof.

Circuit Judge Page held (282 Fed. Rep. 693) that (1) Title III of the Transportation Act was in all respects a valid exercise of Congressional power; (2) the Labor Board is a body corporate subject to the jurisdiction of the Federal Courts, and may sue and be sued; (3) that even though the opinions of the Labor Board "are only advisory" the latter had nevertheless exceeded its power and the Board and its members were subject to the injunctive process of the court.

The Circuit Court of Appeals, in reversing the decree with directions to dismiss the bill (282 Fed. Rep. 701), reviewed the entire proceedings before the Labor Board and held that it had acted within its power. That Court did not rule on the other questions. The Pennsylvania Company then appealed to this court.

Subsequently, on November 13, 1922, it submitted a petition for a writ of certiorari alleging that the case arose under the Constitution and laws of the United States and that questions of constitutional law are involved. In their bill, they allege that if the Labor Board acted within its power, then Title III of the Transportation Act is unconstitutional in its entirety.

On November 20, 1922, the Government submitted a motion to advance the cause for early hearing and represented that "notwithstanding the opinion and judgment of the Court of Appeals reversing the decree of the District Court with directions to dismiss the bill, because of this appeal the permanent injunction is still in full force and effect," and "the public interest is vitally involved in a prompt decision of the question which involves not only large classes of employers and employees, but the public as well."

Counsel for the Company then filed suggestions in opposition to the motion to advance wherein they say:

While *de hors* the record, it may be stated as a matter of common knowledge and interest that since the decision of the District Court the members of System Federation 90 (American Federation of Labor) on the Pennsylvania System joined the general strike and are no longer employes of the Pennsylvania. The places of these men were filled and the Pennsylvania is operating more than 100 per cent of employes over the number employed on the date of the strike, all being represented by committees elected under the company's plan of employe representation.

The Labor Board's decision ordered a conference with and recognition of System Federation 90. Under present conditions this order could not be complied with, as this organization is no longer representative of the Pennsylvania's shop craft employees, or any of them. *This case is, therefore, to that extent practically moot, and no public or private interests are at stake.* * * * (Italics ours.)

Thus, the Pennsylvania Company, aided by the powerful Association of Railway Executives, throughout all of the negotiations with the employees, in their conduct of the proceedings before the Railroad Labor Board, and even in this court, has persisted in inconsistent positions.

For their own purposes the Pennsylvania Company and the Association of Railway Executives stood united. They denied the right of the six organizations representing the Federated Shop Crafts for the same purposes to stand united and to be represented by System Federation No. 90 of the Railway Employees Department of the American Federation of Labor in conducting these negotiations or in invoking the good offices of the Labor Board.

IV.

THE HISTORY OF THE TIMES UNDER WHICH CONGRESS ACTED.

In *Stafford v. Wallace* (No. 687, Supreme Court, October term, 1921, decided May 1, 1922), this Court, speaking through Mr. Chief Justice Taft, said:

It was for Congress to decide from its general information and from such special evidence as was brought before it, the nature of the evils actually present or threatening, and to take such steps by legislation within its power as it deemed proper to remedy them. It is helpful for us in interpreting the effect and scope of the act in order to determine its validity to know the conditions under which Congress acted. (*Chicago Board of Trade v. United States*, 246 U. S. 231, 238; *Danciger v. Cooley*, 248 U. S. 319, 322.)

See also *Church of Holy Trinity v. United States* (143 U. S. 457, 463), *United States v. Trans-Missouri Freight Asso.* (166 U. S. 290, 316, 320), *Standard Oil Co. v. United States* (221 U. S. 1, 50), *Chicago Board of Trade v. United States* (246 U. S. 231, 238).

(A) THE PRESIDENT'S MESSAGE.

President Wilson, in delivering his annual message to the Congress in December, 1916, said:

I would hesitate to recommend, and I dare say the Congress would hesitate to act upon the suggestion should I make it, that any man in any occupation should be obliged by law to continue in an employment which he desired to leave. To pass a law which forbade or prevented the individual workman to leave his work before receiving the approval of society in doing so would be to adopt a new principle into our jurisprudence which I take it for granted we are not prepared to introduce. But the proposal that the operation of the railways of the country shall not be stopped or interrupted by the concerted action of organized bodies of men until a public investigation shall have been instituted which shall make the whole question at issue plain for the judgment of the opinion of the Nation is not to propose any such principle. It is based upon the very different principle that the concerted action of powerful bodies of men shall not be permitted to stop the industrial processes of the Nation, at any rate before the Nation shall have had an opportunity to acquaint itself with the merits of the case as between employee and employer, time to form its opinion upon an

impartial statement of the merits, and opportunity to consider all practicable means of conciliation or arbitration. I can see nothing in that proposition but the justifiable safeguarding by society of the necessary processes of its very life. There is nothing arbitrary or unjust in it unless it be arbitrarily and unjustly done. It can and should be done with a full and scrupulous regard for the interests and liberties of all concerned as well as for the permanent interests of society itself.

(B) THE PREVIOUS LEGISLATION.

The act entitled "An act to create boards of arbitration or commission for settling controversies and differences between railroad corporations and other common carriers engaged in interstate commerce" was approved October 1, 1888 (25 Stat. 501). That act provided "that whenever differences or controversies arise between railroad or other transportation companies engaged in the transportation of property or passengers * * * and the employees of said railroad companies, which differences or controversies may hinder, impede, obstruct, interrupt, or affect such transportation" if, upon the written proposition of either party to the controversy to submit the differences to arbitration, the other party shall accept the proposition, then each of the parties shall select and appoint one person, and the two thus selected and appointed shall select the third, and the three shall constitute the board. The board was authorized to conduct hearings at which the parties had the right to be represented by counsel, and

"after concluding its investigation said board shall publicly announce its decision, which, with the findings of fact upon which it is based, shall be reduced to writing and signed by the arbitrators concurring therein, and, together with the testimony taken in the case, shall be filed with the Commissioner of Labor of the United States, who shall make such decision public as soon as the same shall have been received by him." The President was authorized to select two commissioners, who, together with the Commissioner of Labor, shall constitute a temporary commission for the purpose of examining the causes of the controversy, the conditions accompanying, and the best means for adjusting it; the result of which examination shall be immediately reported to the President and Congress, and on the rendering of such report the services of the two commissioners shall cease. A per diem compensation is provided for the arbitrators and commissioners and all proceedings shall be transacted in public, except consultation. The act contains no provision for affirmative orders on the part of the arbitrators or the commissioners, and there are no penalties for failure on the part of the parties to abide by the decisions.

The act entitled "An act concerning carriers engaged in interstate commerce and their employees," or the co-called Erdman Act (30 Stat., 424), provides that whenever a controversy concerning wages, hours of labor, or conditions of employment shall arise between a carrier and its employees, seriously interrupting or threatening to interrupt the business

of said carrier, the chairman of the Interstate Commerce Commission and the Commissioner of Labor shall, upon the request of either party to the controversy, with all practicable expedition, put themselves in communication with the parties to such controversy and shall use their best efforts by mediation and conciliation, to amicably settle the same, and if such efforts shall be unsuccessful, shall at once endeavor to bring about an arbitration of the controversy in accordance with the provisions of the act. If such mediation and conciliation fails of result, the controversy may be submitted to arbitration of a board of three, one to be named by the carrier, another by the labor organization, and the two shall select the third. If they shall fail to do so, the third arbitrator shall be named by the commissioners referred to. Pending the arbitration the status existing immediately prior to the dispute shall not be changed. The award and the papers and proceedings, including the testimony, shall be filed in the clerk's office of the Circuit Court of the United States, and shall be final and conclusive upon both parties, unless set aside for error of law apparent on the record. The respective parties to the award will each faithfully execute the same and that the same may be specifically enforced in equity so far as the powers of a court of equity permit. Employees dissatisfied with the award shall not quit the service before the expiration of three months without giving 30 days' notice. The employer dissatisfied shall not dismiss any employee before the expiration of three

cedure in the courts with respect to exceptions and judgments of award are substantially the same as those in the Erdman Act. The act provides for a commissioner of mediation and conciliation, who shall be appointed by the President by and with the advice and consent of the Senate, and that the President shall designate not more than two other officials of the Government who have been appointed by and with the advice and consent of the Senate, and the three shall constitute the United States board of mediation and conciliation. An assistant commissioner of mediation and conciliation is also provided for, who shall be appointed by the President by and with the advice and consent of the Senate.

(C) THE CANADIAN INDUSTRIAL DISPUTES INVESTIGATION ACT OF
1907.

The Canadian act provides for the appointment of boards of conciliation and investigation and procedure for reference of disputes.

Paragraphs 23, 24, 25, 26, 27, and 28 provide for functions, powers, and procedure of boards and for giving publicity to decisions. Paragraph 29 provides that "for the information of Parliament and the public, the report and recommendation of the board, and any minority report, shall without delay be published in the Labour Gazette, and be included in the annual report of the department of labor to the governor general."

Paragraphs 56, 57, 58, 59, 60, and 61 provide that it is unlawful for any employer to declare or cause

a lockout, or for any employee to go on strike, or act on any dispute prior to or during a reference of such dispute to a board of conciliation and investigation, or prior to or during a reference under the provisions concerning railway disputes in the conciliation and labor act; that employers and employees shall give at least 30 days' notice of an intended change affecting conditions of employment with respect to wages or hours, and in the event of such intended change resulting in a dispute, until the dispute has been finally dealt with by a board neither of the parties affected shall alter the conditions of employment with regard to wages or hours, or on account of the dispute do, or be concerned in doing, directly or indirectly, anything in the nature of a lockout or strike, or a suspension or discontinuance or employment or work, but the relationship of employer and employee shall continue uninterrupted by the dispute or anything arising out of the dispute; if, in the opinion of the board, either party uses any provision of the act for the purpose of unjustly maintaining a given condition of affairs through delay, and the board so reports to the minister of labor, such party shall be guilty of an offense and liable to penalty; any employer declaring or causing a lockout contrary to the provisions of the act shall be liable to a fine of not less than \$100 nor more than \$1,000 for each day or part of a day that such lockout exists; any employee who goes on strike contrary to the provisions of the

act shall be liable to a fine of not less than \$10 nor more than \$50 for each day or part of a day that such employee is on strike; any person inciting, encouraging or aiding in any manner any employer to declare or continue a lockout, or any employee to go or continue on strike contrary to the provisions of this act, shall be guilty of an offense and liable to a fine of not less than \$50 nor more than \$1,000; the procedure for enforcing the penalty shall be the same as that prescribed by the Criminal Code relating to summary convictions.

(D) THE PROCEEDINGS IN THE SENATE.

Senator Cummins (Iowa) on November 10, 1919, submitted to the Senate the report of the Senate Committee on Interstate Commerce (to accompany S. 3288).⁷

He had charge of the bill in the Senate, and with respect to the conference report,⁸ said:

To me the thought is abhorrent that the judgment of a governmental tribunal composed of fair, high-minded men—a tribunal which takes into consideration the rights of man and speaks for the public welfare—can be overthrown or disregarded by any class of our citizens. *Whenever the public interest requires the Government to assume jurisdiction over a dispute and to enter its decree expressing the very right of the matter*, all of us, no matter how we work or where we work, ought to respect and abide by the decision. (Italics ours.)

⁷ Appendix B.

⁸ Appendix C.

Senator Robinson (Arkansas), February 23, 1920, said (Cong. Rec., vol. 59, pt. 4, p. 3334):

No method of enforcing the decisions of the Labor Board is expressed in the bill. I thought and still think that the law should declare decisions of the Labor Board final and binding. The conference committee, however, did not take that view. It leaves for future determination, either by construction of its express provisions or by subsequent legislation, the determination of the effect and manner of enforcement respecting the decisions of the Labor Board.

No penal provision, such as was carried in the Cummins bill, no penalty of any character whatever is embraced. *The forces of publicity and public opinion are relied on as the chief agencies in carrying out the decisions.* If public opinion sustains them, strikes will become ineffective and will be rarely resorted to. A strike can not be maintained to enforce a demand deliberately withheld by the employees from consideration and decision by the Labor Board. If a carrier, in the face of a threatened strike, should refuse to submit its cause for decision, the public would at once decide against the carrier, and the same thing would result if employees threatening to strike should refuse before doing so to have their case considered and determined. They would lose the strike when they began it, and only one effort of that character would ever be made.

Senator Myers (Montana), February 23, 1920,
said (Cong. Rec., vol. 59, pt. 4, p. 3334):

As I understand the bill, as it now is before the Senate for action, the provision for arbitration between railroad companies and their employees as to wages and working conditions is purely voluntary and can not be enforced. I think it would be far better to have a provision for a fair and impartial tribunal to decree what are adequate wages and fair working conditions and to have the power to compel the railroad companies to grant them. I think that would be far better for the railroad companies, for the railroad employees, and for the public and all interests concerned.

(E) THE PROCEEDINGS IN THE HOUSE.

The managers on the part of the House, on February 21, 1921, reported:⁹

The House bill provided for no representation of the public upon any of its boards or commissions. The Senate amendment subjected all decisions of its tribunals to review by a public board, the transportation board. The conference bill (see section 307 (c)) provided for appointment of members to represent the public along with those representing the carriers and employees upon its supreme tribunal, and, moreover, requires that though a decision may be reached by a majority vote, nevertheless a decision in respect to wages is not effective unless at least one of the public representatives concurs therein.

* Appendix D.

The House bill made it the duty of carriers and their employees to take all possible means to adjust their differences in the first instance before referring the dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill, directing the officials of a carrier and their employees to appoint representatives to confer over all matters of dispute. In case of the failure of such conference, the House bill provided that no dispute should come within the jurisdiction of an adjustment board unless both the carriers and the employees jointly agreed to submit it to the adjustment board. The Senate amendment permitted disputes to reach a regional board or the committee on wages and working conditions upon the application of either party to the dispute, but made no provision for any action by any tribunal upon its own initiative. The provisions of the conference bill (see section 307 (a) and (b)) permits action by the Railroad Labor Board not only upon application of either party or by petition of unorganized employees but also upon the adjustment board's or the Railroad Labor Board's own motion.

Representative Esch (Michigan), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8509, 8510):

Title III was born in the Committee on Interstate and Foreign Commerce, and no influence outside of that committee room

dictated a single line or phrase. So much for the origin of Title III. We believe that we have created the fairest machinery for the creation of adjustment and appeal boards presented in any proposition before this House, and I am bold enough to say fairer than any suggested from any other source.

We felt that we must create a board of such fairness that it would compel the respect of labor and the respect of the employer and of the general public. We believe that this bill creates such a board.

It is complained that it is too complex. It is no more complex than the machinery of the Federal reserve act for the creation of the Federal Reserve Board. Once this bill becomes operative and the adjustment board is created, the proceeding thereafter would be largely automatic. We feel that we have presented to you a fair and reasonable proposition and one as good, if not better, than any that has been presented.

* * * * *

Another thing, under the Anderson proposition you have got to get before this adjustment board on application of the employers and employees. It is easy to conceive that there may be many disputes where there would be occasion for the adjustment board through the application of only one of the parties to act. *It might be impossible to get the machinery started if both parties to the dispute had to jointly make application.*

Representative Winslow (Massachusetts), November 12, 1919, said (Cong. Rec., vol. 58, pt. 8, pp. 8381, 8382):

Now, the other object that I want to talk about is the labor question. Intricate and troublesome as the financial proposition has been to everybody, both on the subcommittee and on the full committee, I am sure it has not tried the souls of the members as has this labor proposition. That was the subject entering into the discussion of every phase of the construction of this bill. We were never without it. Its shadow was over us from the beginning to the end. We referred to it from time to time and finally got down to the point where we had to consider it specifically, and for four days and a half we worked on that labor problem, and I think every member was dreaming of it every night. We had all sorts of suggestions, all the wild-eyed schemes you could think of, every sort of ism and squism that you could imagine.

They were all brought in before the committee. We had the suggestion of the man who would "eat 'em alive"; we had the suggestion of the man who would not pay any attention to them at all, God bless them; and there we were. Everybody of that subcommittee had the feeling in his soul that if any operative of a railroad did anything nasty or mean or willful or disloyal or unpatriotic, to the extent of creating an interference with the public good, he ought to be handled in some way, and that if anybody willfully did anything that was reprehensible

and rotten, he ought to be taken by the throat and squeezed back on his job. That is the inner heart of every man in this House, and it is the inner heart of every man outside. It is the inner heart of the inside of the labor organizations, if in any particular case a man's toes or the toes of his family are stepped on.

* * * * *

As time is fleeting, I will boil it down. We analyzed the situation as well as we could, and there were some in that subcommittee who did not give up the idea of putting long, hard, second molars into the bill—not milk teeth, but real molars that might be expected to stay for a while. But the more we tried to apply the principle of coercion by force, the more we tried to work out penalizing provisions, the more we realized that the task was difficult. Legal objections came up on this side, practical objections born of experience on the other. The great human element that must be considered in this matter above everything else before we will ever work it out all seemed to tend to the establishment of a conclusion that no matter what we did about eating 'em alive, no matter what we did about shooting them at sight, first of all we must be righteous, we must be decent, and give every man in this country a chance in the beginning to discuss his troubles and settle them like men and gentlemen. So then we said, "We, will go to work on that line, and if the teeth business has to come along and we have to make a set, we will do that after we have tried the peaceful and friendly proposition."

Now when we got to the establishment of the friendly method which has been set up in this bill and which we can discuss in detail later, we all agreed that there was only one real weapon with which we could vanquish the foe, and that was the great public opinion of the country, and we framed that bill so that the contenders could rub their noses together at a different stage of the game, force them right into the pit, rat and pup, without regard to which is which and let them go at it. If they can learn to live and eat out of the same saucer, well and good; they will find it out and it will be easier for them to do it the next time, and the generations to come will have no trouble about it. But the very minute it becomes a fight to the finish, we know the results, because we have been living in that atmosphere. So in the subcommittee we never got to the point of applying a penalty in the sense of having teeth in it, and when it came into the full committee the rest of them finally came to feel the same way.

Some members felt that we ought to be firmer, that we ought to be stronger, and some of them, I fancy, will so express themselves on this floor; but the majority of them came to feel that after all the subcommittee were right, so we left the bill as it is. That is the reason for it. That is the argument. And I want to tell you, my friends, if any of your neighbors tell you that the committee, or you if you support the committee, are lacking in moral courage in not putting in a provision with teeth in it, you just tell them for me—and I have had more of it by a darned sight

than I wish I had had—that it takes a great deal more courage to stand up and extend the right hand to a fellow you are against, and say, "Well, now, God bless you, let's see if we can't get together," than it does to square off and hit him if you think you are big enough to get away with it.

Representative Winslow (Massachusetts), November 14, 1919, further said (Cong. Rec., vol. 58, pts. 1-9, p. 8518):

Mr. Chairman, the provisions of the bill on this subject represent the finding and recommendations of the subcommittee. I think the differences of opinion expressed here to-day clearly indicate the difficulties under which that subcommittee labored. We had to determine, first of all, whether we would undertake to recommend provisions of law which would provide a penalty of one sort or another, or whether we would follow out the more conciliatory plan of action. *We concluded that the trend of the times and the thought of the hour ran strongly in favor of the conciliatory plan.* So we determined that we would work out the machinery on that basis. How should we go about it? How should we provide for the consideration of the differences? (Italics ours.)

Representative Hulings (Pennsylvania), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, p. 8508):

Compulsory arbitration will not work. It has always failed in times of crisis. Civil damages for breach of contracts made by labor leaders can not bind the thousands of workmen personally in damages.

Where, then, is the remedy if employer and employees do not agree?

The Anderson amendment makes an appeal to public sentiment, which, after all, in this country transcends the power of Congress or courts or sheriffs.

It provides the machinery by which the contending parties present their cases in a public, open discussion before arbitrators of mediation and conciliation.

It is true, if the working man is still dissatisfied, he can quit his job. He always has that right, and need give no reason, but the real power of the bill is that if the award meets the approval of public opinion no labor organization could carry on a strike. Public wrath and indignation would quickly smother it.

* * * * *

This bill is an appeal to public opinion. It is based on a belief in the patriotism of American workingmen and that they will stand by a square deal. I favor the Anderson amendment.

Representative Sims (Tennessee), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8506, 8507):

I will vote for the Anderson substitute as an amendment to the Webster substitute, but I do think, under all the circumstances, with the days and weeks of labor the committee conscientiously put in on this provision, it should not be lightly swept aside. Gentlemen get up here and say, "We want something that

has teeth in it." What are the teeth they refer to—the teeth of the carnivorous animal, of the flesh-tearing and lacerating variety, the dog's teeth, the tiger's teeth, the lion's teeth, the hyena's teeth—the teeth of barbarism, of uncivilization? What is our object? What are we trying to do? Bring about agreements between those that are in disagreement? This should not even be called a decision, because it is not, in fact. There comes about a condition calling for the modifying of an existing contract. Therefore, not being a question of law only, but rather a question of justice between employer and employee, it is highly proper that it should be submitted to an adjustment board composed of equal numbers of employers and employees, and let them try to modify the contract by agreement, because they are parties to it. What business has the public in that kind of a controversy? The public did not make the contract and would not know how it ought to be modified.

But the public have an interest, above and beyond all others, and that is the interest to bring about an amicable modification of the contract without resorting to the teeth of the dog, or the club of the savage, or the bayonet of Prussianism.

* * * * *

I do not believe an appeal board is worth much, practically. Why? It is an agreement we are trying to bring about, and not a decision in a judicial sense. Such appeals in their very nature smack of judicial decisions,

are appeals from a lower to a higher court, but on that board three nonvoting representatives of the public come in and five of the six that have the power to vote decide the controversy. The truth about it is this, that if the railroad people, the employers, believed they could get a better deal out of the appeal board than the lower board, there is a premium offered for failing to bring about an agreement. If labor, on the other side, thinks it can do better by appealing, there is a premium for it to refuse to agree. Therefore I thought the committee bill ought to provide for the discharge of the committee on conciliation, if it fails to agree within a reasonable time, and select a new committee from the same panel, and a new jury is selected because the other jury has failed to agree, and keep them there until they do agree.

* * * * *

I suggested to provide that if the employees come to a disagreement with their employers and can not agree among themselves, they must submit the controversy to this equally balanced board, on which labor and capital, employer and employee, have an equal number of the board as selected by themselves.

Representative Steele (Pennsylvania), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8501, 8502):

First, what are the rights of the public? I do not propose to go into an elaborate discussion of that question, because, to my mind, it is completely settled by the decision of the Supreme Court in both the Adamson case and

the Debs case. In the Adamson case it will be recalled that in the opinion of Judge McReynolds he summarized what was actually decided in that case, and he states that under that decision it is within the power of Congress to fix either a minimum or a maximum wage or to provide for compulsory arbitration. So that, so far as the legal aspects of it are concerned, this Congress possesses full power to provide for the protection of the public, even to the limit of what is provided in the amendment of Judge Webster if it sees fit to do so.

To my mind, however, it may not be wise to go to that limit. What are the remedies that should be provided, and what is the grievance of the public under the circumstances? From the last census it appeared that 46 per cent of the entire population of the country resided in cities and towns, and in five of the States 75 per cent of the population lived in towns. So that it can be stated that 55,000,000 of the people residing in this country are absolutely dependent upon the transportation systems of the country to supply them with the necessities of life. Take, for instance, if you will, New York City, that great center of population, with its 6,000,000 people. There is not at any one time more than probably a two weeks' supply of fuel and food in that city. There is not enough milk in the city of New York to feed the babies for 48 hours. And what confronts New York City confronts every center of population in the country in a lesser degree.

Now, the public, this 55,000,000 people dependent upon these transportation systems, are they entitled to consideration in providing a remedy for the settlement of these disputes? To my mind they are, and I entirely agree with what ex-Speaker Cannon said in reference to the proper adjustment of that matter.¹⁰

V.

THE QUESTIONS.

Concretely stated, the assignments of error raise the following questions:

First. Was the suit brought against the United States without its consent?

Second. Has the court such jurisdiction over the Labor Board that it may control the members in the discharge of their administrative discretion and action during the progress of hearings, and the course of deliberations and the publication of decisions?

Third. Did the Labor Board proceed under section 301 exclusively and without regard to the remaining sections of Title III; and if so, had the Labor Board jurisdiction so to proceed in the absence of a joint submission by all of the parties?

¹⁰ Appendix E for debates of other Members.

VI.

ARGUMENT.

A.

**THE SUIT WAS BROUGHT AGAINST THE UNITED STATES
WITHOUT ITS CONSENT.**

Section 304 of Title III provides that there is hereby *established* a board to be known as the "Railroad Labor Board" and to be composed of nine members, three constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees offered by the employees; three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees offered by the carriers; three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

One from each group shall be appointed for a term of three years, one for two years, and one for one year. Their successors shall hold office for terms of five years. Each "shall receive from the United States an annual salary of \$10,000," and "a member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause." There was appropriated \$50,000 for the expenses of the board.

It must be conceded on all hands that the creation and organization of the Railroad Labor Board was

in pursuance of a governmental policy for the peaceful settlement of disputes between carriers and their employees and to dispense for all time with such conditions as preceded the decisions of the Supreme Court *In re Debs, petitioner* (158 U. S. 578, 579, 582, 583, 586, 599), and *Wilson v. New* (243 U. S. 340, 342, 346, 347, 348, 349, 350, 352, 353). The Labor Board is a public body created to protect the public interest. Every Senator and Representative in Congress who spoke on the bill so stated most emphatically.

In *Akron, Canton & Youngstown Ry. v. United States*, 282 Fed. Rep. 306, 313, Circuit Judge Manton, in delivering the opinion, said: "*The public interest is the leading characteristic of the transportation act.*"

The status of this suit in equity is very much the same as if it had named the President as defendant and prayed to enjoin him from preparing and delivering to Congress a message on the same subject; or the committee of the Senate, or the committee of the House of Representatives, to enjoin either, or both, of them from conducting hearings and preparing and issuing reports on the same subject. The Labor Board is functioning under Title III under the direct mandate of Congress and is an arm of the Government precisely as a committee of the Senate or House. The suit is, therefore, against the United States; and it is the Government and Congress who stand enjoined under the decree of the District Court and who are on trial at the Bar.

In *Knight v. Lane* (228 U. S. 6), *Ness v. Fisher* (223 U. S. 683), and *Riverside Oil Co. v. Hitchcock* (190 U. S. 316) applications for mandamus were denied where, the title to public land being still in the Government, attempts were made to control the action of departmental officers regarding the issuance of patents. The principle underlying these cases is thus expressed in *Ness v. Fisher* (p. 691):

So, at the outset we are confronted with the question, not whether the decision of the Secretary was right or wrong, but whether a decision of that officer, made in the discharge of a duty imposed by law and involving the exercise of judgment and discretion, may be reviewed by mandamus and he be compelled to retract it, and to give effect to another not his own and not having his approval. The question is not new, but has been often considered by this court and uniformly answered in the negative.

Minnesota v. Hitchcock (185 U. S. 373), *Oregon v. Hitchcock* (202 U. S. 60), and *Louisiana v. Garfield* (211 U. S. 70), were original actions in this court brought by those States against the Secretary of Interior seeking to enjoin him from selling, patenting, or making any disposition of certain lands to which those States claimed title. It was held that the United States was the *real party in interest*; that it consented by statute to be sued in the *Minnesota* case, and the bill was there dismissed on its merits; that in the *Oregon* and *Louisiana* cases no consent to be sued had

been given and that as the legal title to the public lands was still in the Government, no suit could be brought without its consent which would permit an inquiry into the question of title. In the *Louisiana* case there were questions of law and fact as to whether the United States still owned the land. The court pointed out the contentions which the United States might make in that respect and said (p. 77):

It raises questions of law and of fact upon which the United States would have to be heard. The United States fairly might argue that, * * * for equitable relief on the ground of title in the plaintiff, in the teeth of the last-named act, it would be necessary at least to allege that the State took and has held possession under the void grant. The United States might and undoubtedly would deny the fact of such possession, and that fact can not be tried behind its back. It follows that the United States is a necessary party and that we have no jurisdiction of this suit.

In *Stanley v. Schwably* (147 U. S. 508, and, on a second writ of error, 162 U. S. 255), it was held that where the United States had title to part of a tract of land, no judgment could be entered against United States officers awarding title to the plaintiff for another interest in the land and possession of the whole jointly with the individual officers, because such judgment (162 U. S. p. 272)—

was directly against the United States and against their property and not merely against their officers.

It is needless to multiply authorities. It is abundantly settled that suits can not be brought against officers of the Federal Government, the object of which is (a) to compel the execution of a contract (*International Contracting Co. v. Lamont*, 155 U. S. 303), (b) to compel acts to be done, which, when done, would constitute performance by the State of a contract, or to enjoin things from being done which if done would constitute a breach by the State of a contract (*In re Ayers*, 123 U. S. 443; *Hagood v. Southern*, 117 U. S. 52), (c) to compel some affirmative official action in the performance of an obligation of the State (*Hagood v. Southern*, 117 U. S. 52, 69, 70), or (d) to collect money (*Smith v. Reeves*, 178 U. S. 436, 439; *Louisiana v. Jumel*, 107 U. S. 711, 726-8; *Belknap v. Schild*, 161 U. S. 10, 26) where, under the principles enunciated in the preceding cases, the State being a necessary party, on account of the effect of the decree on its property or rights, the bill must be dismissed (*Wells v. Roper*, 246 U. S. 335, 337; *Christian v. Atlantic & N. C. R.*, 133 U. S. 233, 241, 244, 245; *Cunningham v. Macon & B. R. Co.*, 109 U. S. 446, 451, 457).

In *Wells v. Roper* (246 U. S. 335) the plaintiff sued the First Assistant Postmaster General to enjoin him from canceling or otherwise interfering with the performance of a contract which the plaintiff had with the Postmaster General for furnishing certain automobiles for use in collecting the mail. The court held the bill must be dismissed on its face because the defendant was without personal interest,

was acting solely in his official capacity and within the scope of his duties, and that the effect of the injunction would be to interfere with one of the ordinary processes of Government; that the interests of the Government were so directly involved as to make the United States a necessary party and therefore to be considered as in effect a party defendant; that the plaintiff's duties with respect to the contract were not ministerial, but were executive, and required the exercise of official discretion; and that the bill could not be maintained even though "the proposed action may have been unwarranted by the terms of the contract and such as to constitute an actionable breach of that contract by the United States."

In *Louisiana v. McAdoo* (234 U. S. 627) the State of Louisiana sought to file a bill against the Secretary of the Treasury to prohibit him from allowing certain reduced duties on sugar importations. It was held that the duties of the Secretary of the Treasury involved the exercise of judgment and discretion in carrying out the revenue collections of the Government and that to interfere in the exercise of such duty would be to interfere with the ordinary functions of Government and be in effect a suit against the United States. To the same effect see *United States v. Black* (128 U. S. 40, 48), *Decatur v. Paulling* (14 Pet. 497, 515).

In *Degge v. Hitchcock* (229 U. S. 162, 171), it was held that the action of the Postmaster General in issuing a fraud order may not be reviewed by the extraordinary remedy of certiorari, and that so long

as proceedings before an executive officer are *in fieri* the courts will not interfere. In delivering the unanimous opinion of the court, Mr. Justice Lamar said:

It is true that the Postmaster General gave notice and a hearing to the persons specially to be affected by the order and that in making his ruling he may be said to have acted in a *quasi-judicial* capacity. *But the statute was passed primarily for the benefit of the public at large and the order was for them and their protection.* That fact gave an administrative quality to the hearing and to the order and was sufficient to prevent it from being subject to review by writ of certiorari. The Postmaster General could not exercise judicial functions, and in making the decision he was not an officer presiding over a tribunal where his ruling was final unless reversed. *Not being a judgment, it was not subject to appeal, writ of error, or certiorari.* Not being a judgment, in the sense of a final adjudication, the appellants were not concluded by his decision, for had there been an arbitrary exercise of statutory power or a ruling in excess of the jurisdiction conferred, they had the right to apply for and obtain appropriate relief in a court of equity. (*School of Magnetic Healing v. McAnnulty*, 187 U. S. 94; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 620.)

The fact that there was this remedy is itself sufficient to take the case out of the principle on which, at common law, right to the writ was founded. For there it issued to officers and tribunals only because there was no other method of preventing injustice.

Besides, if the common law writ, with all of its incidents, could be construed to apply to administrative and *quasi-judicial* rulings, it could, with a greater show of authority, issue to remove a record before decision, and so prevent a ruling in any case where it was claimed there was no jurisdiction to act. This would overturn the principle that, as long as the proceedings are *in fieri*, the courts will not interfere with the hearing and disposition of matters before the departments. (*Plested v. Abbey*, 228 U. S. 42, 51.) To hold that the writ could issue either before or after an administrative ruling would make the dispatch of business in the departments wait on the decisions of the courts and not only lead to consequences of the most manifest inconvenience, but would be an invasion of the Executive by the judicial branch of the Government.

The writ of certiorari is one of the extraordinary remedies and, being such, it is impossible to anticipate what exceptional facts may arise to call for its use, but the present case is not of that character, but rather an instance of an attempt to use the writ for the purpose of reviewing an administrative order. (*Public Clearing House v. Coyne*, 194 U. S. 497.) This can not be done.

In *United States v. Babcock* (250 U. S. 328) Army officers sued and recovered judgments in the Court of Claims under the act of 1885, which authorized reimbursement of claims of that character for the loss, while in the service and without fault, of pri-

vately owned personal property. It was held that no recovery could be had, because the act contemplated that the determination of liability should be by the Treasury Department and not by the Court of Claims. The court said (p. 331):

These general rules are well settled: (1) That the United States, when it creates rights in individuals against itself, is under no obligation to provide a remedy through the courts [citations omitted]. (2) That where a statute creates a right and provides a special remedy, that remedy is exclusive. (*Wilder Mfg. Co. v. Corn Products Co.*, 236 U. S. 165, 174-175; *Arnson v. Murphy*, 109 U. S. 238; *Barnett v. National Bank*, 98 U. S. 555-558; *Farmers & Mechanics' National Bank v. Dearing*, 91 U. S. 29, 35.) See also *Paine Lumber Co. v. Neal* (244 U. S. 459-471.)

B.

ORDERS OF ADMINISTRATIVE OR QUASI JUDICIAL BODIES WHICH DO NOT COMPEL AFFIRMATIVE ACTION ARE NOT REVIEWABLE BY THE COURTS.

The act to regulate commerce, approved February 4, 1887, provided by section 15 thereof that the commission might file a petition in the appropriate United States Circuit Court for the enforcement of its order. (24 Stat. 379, 384.) Under the Hepburn amendment of June 29, 1906 (34 Stat. 584, 589), that provision was reenacted, and as penalties were then provided for failure to comply with orders of the commission other than for the payment of money the further provision was enacted that the venue of suits brought in any of the circuit courts of the

United States against the commission to enjoin, set aside, annul, or suspend its orders shall be in the district where the carrier has its principal operating office (34 Stat. 592). The Commerce Court act (36 Stat. 539) and the urgent deficiencies act of October 22, 1913 (38 Stat. 208, 219), which abolished the Commerce Court, contain elaborate provisions for judicial review of the orders of the Interstate Commerce Commission on questions of law. This court has held in a line of cases that such court review did not extend to hearings and reports which were followed by orders which did not compel affirmative action.

In *Proctor & Gamble Co. v. United States* (225 U. S. 282) complainant before the commission had assailed the validity of a rule which directed that demurrage charges which accrued on private cars standing on the private tracks of the shipper should be paid by the latter to the railroad company after the expiration of the free time, when an arrangement existed between the shipper and the railroad company for the use of the cars by the latter for the carriage of the property of the shipper. After a full hearing the commission dismissed the complaint. (19 I. C. C. 556.) Whereupon the shipper filed bill in the Commerce Court to annul and enjoin the order of the commission. Over the objection of the Government the Commerce Court took jurisdiction and dismissed the petition on the merits of the case. (188 Fed. Rep. 221.) On appeal this court reversed the judgment and held that the Commerce Court was without jurisdiction to entertain the bill.

In *Lehigh Valley Railroad Co. v. United States* (243 U. S. 412, 414) the act of August 24, 1912 (c. 390, sec. 11, 37 Stat. 560, 566), known as the Panama Canal act, prohibited after July 1, 1914, any ownership by a railroad in any common carrier by water when the railroad might compete for traffic with the water carrier; the commission was authorized to determine questions of fact as to such competition. On application of carriers the commission was authorized to extend the time for the relinquishment of the ownership if the extension would not exclude or reduce competition on the water route. Lehigh Valley filed a petition praying for a hearing as to whether the services of a steamboat line owned by it would be in violation of the act and for an extension of time. The petition was dismissed and the statute became absolute against the company. (33 I. C. C. 699, 706, 716; 37 I. C. C. 77.) The bill was filed to prevent the enforcement of the order of the commission. The District Court denied the injunction and dismissed the bill. (234 Fed. Rep. 682.) In holding that the District Court was without jurisdiction over the report and order of the commission this Court said:

We assume that the question whether the facts found by the commission present a case of real or possible competition within the meaning of the statute is a question of law that could not be conclusively answered by the commission; but still there is nothing for a court of equity to enjoin if all that the commission has done is to decline to extend the

time during which the railroad can keep its boat line without risk.

In *United States v. Illinois Central Railroad Co.* (244 U. S. 82) the decree of the District Court enjoined and canceled an order of the commission fixing a hearing of certain complaints made to it by certain coal companies for damages for alleged failure to furnish cars upon demand. In that case the railroad company had denied the right of the commission to proceed with the controversy for lack of jurisdiction. Nevertheless, the commission fixed the case for hearing with directions to the parties to proceed. The decree of the District Court adjudged that the complaints "are beyond the jurisdiction of the * * * commission to hear and determine," the order and notice fixing the case for further hearing were canceled, "and the said * * * commission, its members, officers, agents, attorneys, and employees be, and the same are hereby, permanently enjoined from further proceeding with the hearing of the said complaints, or any of them." In reversing the decree, this Court said (85, 89):

In the appellee's petition in the District Court it alleged that the hearing would be proceeded with unless restrained, that the railroad company would be compelled to attend such hearing, would be put to great expense, and that in all probability an order of reparation would be made; that the railroad company would be forced to defend at great trouble and expense three separate and several suits at law

based on such awards, all of which would depend upon the same facts and principles of law, thereby subjecting the railroad company to a multiplicity of suits; and that if reparation should be awarded it would be placed at great disadvantage in defending suits based on the awards, since the commission's finding of the ultimate facts is by statute made *prima facie* correct; and no opportunity is given for a judicial review of the strength and competency of the evidence upon which such a finding rests.

* * * * *

It was decreed that the commission had no jurisdiction to hear and determine the complaints of the coal companies, that its order be canceled, and it be permanently enjoined from further proceeding with the hearing of the complaints.

* * * * *

The notice, therefore, had no characteristic of an order, affirmative or negative. It was a mere incident in the proceeding, the accident of the occasion—in effect, and, it may be contended, in form, but a continuance of the hearing. The fact that the continuance was to another day and place did not change its substance or give it the character described in *Procter & Gamble Co. v. United States*, one which constrained the railroad company to obedience unless it was annulled or suspended by judicial decree.

The instant case is much weaker than that presented in *United States v. Illinois Central*, *supra*. In the latter the company undertook to proceed under statutes which authorized suits to annul and

enjoin orders of the commission. In the instant case the statute contains no provision for suits either by or against the Labor Board and its members, or for suits to enjoin and annul its alleged "advisory" decisions. If, under the foregoing statutes, an order which does not compel affirmative action, and for which there is no penalty for disobedience, is not subject to the jurisdiction of the equity court, *a fortiori*, neither the Labor Board nor its members nor its advisory decisions are subject to the jurisdiction of the equity court in the total absence of any such statute.¹¹

¹¹ The Federal Trade Commission act (38 Stat. 717, 720) provides judicial machinery for the review of orders of that body.

The Sherman Antitrust Act provides how its provisions may be enforced (26 Stat. 209).

The Packers and Stockyards act of 1921, approved August 15, 1921, contains provisions for judicial proceedings for enforcement of the act. See *Stafford v. Wallace* No. 687, Supreme Court, October Term 1921, decided May 1, 1922.

The United States warehouse act of August 11, 1916 (39 Stat. 446, 483), enforced by the Department of Agriculture, provides—

"Sec. 5. That no person, except as permitted in section four, shall represent that any grain shipped or delivered for shipment in interstate or foreign commerce is of a grade fixed in the official grain standards other than as shown by a certificate therefor issued in compliance with this act; and the Secretary of Agriculture is authorized to cause examinations to be made of any grain for which standards shall have been fixed and established under this act, and which has been certified to conform to any grade fixed therefor in such official grain standards, or which has been shipped or delivered for shipment in interstate or foreign commerce. Whenever, after opportunity for hearing is given to the owner or shipper of the grain involved, and to the inspector thereof if the same has been inspected, it is determined by the Secretary that any quantity of grain has been incorrectly certified to conform to a specified grade, or has been sold, offered for sale, or consigned for sale under any name, description, or designation which is false or misleading, he may publish his findings."

"Sec. 24. That the Secretary of Agriculture is authorized to cause examinations to be made of any agricultural product stored in any warehouse licensed under this act. Whenever, after opportunity for hearing is given to the warehouseman conducting such warehouse, it is determined that he

In Reetz v. Michigan (188 U. S. 505, 508), this court said:

Neither is the right of appeal essential to due process of law. In nearly every State are statutes giving, in criminal cases of a minor nature, a single trial without any right of review. For nearly a century trials under the Federal practice for even the gravest offenses ended in the trial court, except in cases where two judges were present and certified a question of law to this court. In civil cases a common rule is that the amount in controversy limits the entire litigation to one court, yet there was never any serious question that in these cases due process of law was granted.

is not performing fully the duties imposed on him by this act and the rules and regulations made hereunder, the Secretary may publish his findings."

The following acts authorize the Secretary of the Interior, who is charged with the enforcement thereof, to compile and publish statistics with respect to the following subjects, viz:

- Geological Survey organization act. (20 Stat. 394.)
- Geological Survey printing act. (32 Stat. 741.)
- Geological Survey printing act. (35 Stat. 988.)
- Education organization act. (15 Stat. 106.)
- Education printing act. (29 Stat. 171.)
- Mines organization act. (36 Stat. 369.)
- Mines printing act. (36 Stat. 883.)

The Bureau of the Census (Department of Commerce) compiles and publishes, in accordance with the requirements of the Constitution for the enumeration of the inhabitants of the United States, decennial reports relating to population; also decennial reports on mines and quarries, wealth, debt and taxation; religious bodies; transportation by water; fisheries; benevolent institutions; insane and feeble-minded in hospitals and institutions; prisoners and juvenile delinquents; it also publishes quinquennial reports on manufactures and electrical industries; a biennial edition of the Official Register of the United States; annual reports on vital statistics and statistics of cities; semiannual reports on stocks of leaf tobacco held by manufacturers and dealers; and, at frequent intervals during the cotton season, statistics of cotton production, consumption, and distribution, and cottonseed production.

See also *United States v. Heinze* (218 U. S. 532, 546); *Lott v. Pittman* (243 U. S. 588, 591).

As Title III contains no penalty for disobedience of any decision, there was no constitutional right which an injunction may protect.

C.

**THE FAILURE TO PROVIDE FOR ANY JUDICIAL REVIEW
OF THE DECISIONS OF THE LABOR BOARD IS NOT A
DENIAL OF DUE PROCESS OF LAW.**

Concerning the omission of any penalties from the provisions of Title III, the District Court said (282 Fed. Rep. 699):

I have reached the conclusion that it was the belief of Congress that the results desired by the legislation could be attained through the force of public opinion and that that public opinion would follow the publication made as provided in section 307 (c) and 313, and would support the decisions of a board, composed of men each of whom would have special knowledge of the difficulties within and the necessities of the group that he was chosen to represent. I am further of the opinion that, acting upon that belief, Congress provided in section 307 (d) for a wide and searching investigation so that the board would have before it all the facts necessary to enable it to reach just and reasonable decisions upon every dispute.

In *Evans v. Pratt*, 3 Manning & Granger Reports, 396, 400 (1842), Lord Chief Justice Tindal, sitting in the Court of Common Pleas in Trinity Term, said:

Taking the whole together, it seems to relieve from penalties in respect to the race taking place elsewhere than at Newmarket or Black Hambleton. The act, being one which professes to take away penalties, should have a liberal construction.

In the same case, Mr. Justice Maule observed (p. 399) that the statute was designed "not to punish persons for doing that which the legislature had encouraged them to do," and that (p. 401) "as that statute is one which takes away penalties, it ought to be largely expounded."

See also Section 441, Sutherland, "Statutory Construction" (1891); *State v. United States Express Co.*, 164 Iowa, 112, 124.

Section 308 (4) provides that the Labor Board "may make regulations necessary for the efficient execution of the functions vested in it by this title." This general provision, together with the specific provisions of Title III, confer upon the Labor Board broad procedural powers.

Concerning the procedure before the Board the Court of Appeals said (282 Fed. Rep. 709):

It is urged for appellee that the matter of the election of representatives by the employees is wholly procedural and is something with which the board is in nowise concerned, and its action in this regard was wholly be-

yond its jurisdiction. The force of the contention is not apparent. Title III confers on the board important duties, and prescribes in section 308 (4) that it "may make regulations necessary for the efficient execution of the functions vested in it by this title." This, alone, if indeed in the very nature of things it were not necessarily so, would empower the board to make provision for determining whether those purporting to represent disputants before the board do in fact so represent them. If it is claimed that a pending dispute has been adjusted between the parties to it, it is very essential that the body before whom the dispute is pending assure itself of the authority to so dispose of the controversy of those who purport to act for the parties. This is especially true where one side of the dispute is a body of individuals such as employees of a great carrier. If, in a controversy pending before a court, its discontinuance is asked because of a settlement between the parties, it is necessary that the court ascertain whether those purporting to represent the parties were in fact such representatives competent to make the agreement. If this is disputed, the court must pass upon that issue; and it is not material whether such an issue is called "procedural" or otherwise. It arises and must be decided. The same situation is presented to the board where its continued jurisdiction over a pending controversy is denied on the ground of its having been settled between the parties. The representative capacity of the purported representatives was

here directly challenged and constituted an issue or dispute which the board had to decide, resulting in Decision No. 218 and its subsequent modification. It was eminently proper that the board, either by general rule or otherwise, indicate how in its best judgment such representation should be manifested and the election conducted.

In *Spiller v. Atchison, etc., Ry. Co.* (253 U. S. 117, 131), this court, referring to the nature of evidence which may be considered and the rules of practice and procedure which prevail before boards of investigation, said:

In *Interstate Commerce Commission v. Baird* (194 U. S. 25, 44), it was said: "The inquiry of a board of the character of the Interstate Commerce Commission should not be too narrowly constrained by technical rules as to the admissibility of proof. Its function is largely one of investigation and it should not be hampered in making inquiry pertaining to interstate commerce by those narrow rules which prevail in trials at common law where a strict correspondence is required between allegation and proof." In *Interstate Commerce Commission v. Louisville & Nashville R. R. Co.* (227 U. S. 88, 93), the court recognized that "The commission is an administrative body and, even where it acts in a quasi-judicial capacity, is not limited by the strict rules as to the admissibility of evidence which prevail in suits between private parties."

In *Public Clearing House v. Coyne* (194 U. S. 497, 508), this court, speaking through Mr. Justice Brown, said:

It is too late to argue that due process of law is denied whenever the disposition of property is affected by the order of an executive department. Many, if not most, of the matters presented to these departments require for their proper solution the judgment or discretion of the head of the department, and in many cases, notably those connected with the disposition of the public lands, the action of the department is accepted as final by the courts, and even when involving questions of law this action is attended by a strong presumption of its correctness. (*Bates & Guild Co. v. Payne*, 194 U. S. 106.)

In *Meeker v. Lehigh Valley Railroad Co.* (236 U. S. 412, 430) this Court said:

It is also urged, as it was in the courts below, that the provision in section 16 that in actions like this "the findings and order of the commission shall be *prima facie* evidence of the facts therein stated" is repugnant to the Constitution in that it infringes upon the right of trial by jury and operates as a denial of due process of law.

This provision only establishes a rebuttable presumption. It cuts off no defense, interposes no obstacle to a full contestation of all the issues, and takes no question of fact from either court or jury. At most, therefore, it is merely a rule of evidence. It does not abridge the right of trial by jury or take away any of

its incidents. Nor does it in any wise work a denial of due process of law. In principle it is not unlike the statutes in many of the States whereby tax deeds are made *prima facie* evidence of the regularity of all the proceedings upon which their validity depends. Such statutes have been generally sustained (*Pillow v. Roberts*, 13 How. 472, 476; *Marx v. Hanthorn*, 148 U. S. 172, 182; *Turpin v. Lemon*, 187 U. S. 51, 59; Cooley's Constitutional Limitations, 7th ed. 525), as have many other State and Federal enactments establishing other rebuttable presumptions. (*Mobile, &c., Railroad v. Turnispeed*, 219 U. S. 35, 42; *Lindsley v. Natural Carbonic Gas Co.*, 220 U. S. 61, 81; *Reitler v. Harris*, 223 U. S. 437; *Luria v. United States*, 231 U. S. 9, 25.) An instructive case upon the subject is *Holmes v. Hunt* (122 Massachusetts, 505), where, in an elaborate opinion by Chief Justice Gray, a statute making the report of an auditor *prima facie* evidence at the trial before a jury was held to be a legitimate exercise of legislative power over rules of evidence and in no wise inconsistent with the constitutional right of trial by jury.

And in *Chicago, &c., Railroad v. Jones* (149 Illinois, 361, 382) a like ruling was made in respect of a statutory provision similar to that now before us.

In *Ex parte Peterson* (253 U. S. 300, 310), this Court said:

* * * it can not be deemed an undue obstruction of the right to a jury trial to require a preliminary hearing before an auditor.

Nor can the order be held unconstitutional as unduly interfering with the jury's determination of issues of fact, because it directs the auditor to form and express an opinion upon facts and items in dispute. The report will, unless rejected by the court, be admitted at the jury trial as evidence of facts and findings embodied therein; but it will be treated, at most, as *prima facie* evidence thereof. The parties will remain as free to call, examine, and cross-examine witnesses as if the report had not been made. No incident of the jury trial is modified or taken away either by the preliminary, tentative hearing before the auditor or by the use to which his report may be put. An order of a court, like a statute, is not unconstitutional because it endows an official act or finding with a presumption of regularity or of verity. (*Marx v. Hanthorn*, 148 U. S. 172, 182; *Turpin v. Lemon*, 187 U. S. 51, 59; *Reitler v. Harris*, 223 U. S. 437; *Mills v. Lehigh Valley R. R. Co.*, 238 U. S. 473; *Chicago, Burlington & Quincy R. R. Co. v. Jones*, 149 Illinois, 361, 382.)

D.

THE COURT WILL NOT PRESUME THAT THE RAILROAD LABOR BOARD WILL ACT ARBITRARILY.

The United States Railroad Labor Board is a branch of the National Government. Its members are appointed by the President, by and with the advice and consent of the Senate. The presumption of good faith on the part of the board and of the regularity of its proceedings prevails at all times.

(*Wigmore on Evidence*, Vol. IV, sec. 2534; *Moffat v. United States*, 112 U. S. 24, 30; *Gonzales v. Ross*, 120 U. S. 605, 616.) In *Howard v. Illinois Central Railroad Company* (207 U. S. 463, 509) Mr. Justice Moody, dissenting, said:

The presumption that other branches of the Government will restrain themselves within the scope of their authority, and the respect which is due to them and their acts, admits of no other attitude from this court.

E.

SYSTEM FEDERATION NO 90 OF FEDERATED SHOP CRAFTS HAD THE RIGHT TO BE HEARD BEFORE THE LABOR BOARD.

In the ponderous bill it is charged that "said act (transportation act) does not contemplate that a carrier should recognize and deal with labor unions as such, and does not by express language or by inference require carriers to deal with officers of labor unions" (Tr. 7, 8).

Counsel for the company maintain that the transportation act, in the use of the terms "organization of employees" and "representatives of employees," intended thereby utterly to exclude and repudiate labor unions. Obviously they were as thoroughly convinced that the words "all carriers and their officers," as used in Section 301, clearly meant the Association of Railway Executives (ante, p. 5).

Moreover, they maintain that System Federation No. 90 was not an "organization of employees"

but a labor union which the statute excluded and repudiated. If they successfully maintain that argument, then, of course, System Federation No. 90 could not have made any kind of submission under Section 301, or any other section, either joint or *ex parte*.

The argument is unsound. The cases of *In re Debs, petitioner*, 158 U. S. 578; *Wilson v. New*, 243 U. S. 340; the Clayton act (38 Stat. 730); *United States v. Railway Employees*, 283 Fed. Rep. 479 (the Railway Strike Case now pending at Chicago); the message of the President; the reports of the committees of both Houses of the Congress, and the debates of the Senators and Representatives preceding the enactment of Title III, all positively leave no room for doubt that the Congress intended that the lawful activities of these organizations of employees should be preserved and that in negotiations with carriers for the adjustment of wages and the betterment of working conditions their representatives were entitled to recognition.

Decision No. 2 (Tr. 41, 42); Decision No. 119 (Tr. 69, 83); addendum No. 2 to Decision 119 (Tr. 88); Decision No. 218 (Tr. 92); addendum No. 1 thereto (Tr. 103); and order In re: Docket 404 (Tr. 106), all recognize the several shop craft and other organizations as proper parties to appear and be represented before the Railroad Labor Board.

In *United States v. Railway Employees*, 283 Fed. Rep. 479, the six shop craft organizations and the

officers and members thereof were made defendants to the bill of complaint to restrain and enjoin their unlawful activities in combining and conspiring to interfere with, hinder, obstruct, and restrain interstate trade and commerce, and the carriage of the United States mails, upon and over the lines of the railroads and systems of transportation of the United States.

In *United Mine Workers v. Coronado Coal Co.*, No. 31, Supreme Court, October Term, 1921, decided June 5, 1922, this court, speaking through Mr. Chief Justice Taft, said:

Trade unions have been recognized as lawful by the Clayton Act; they have been tendered formal incorporation as National Unions by the act of Congress approved June 29, 1886 (24 Stat. 86). In the act of Congress, approved August 23, 1912 (37 Stat. 415), a commission on industrial relations was created providing that three of the Commissioners should represent organized labor. The Transportation Act of 1920, Sections 302-307 (41 Stat. 469), recognizes labor unions in creation of railroad boards of adjustment, and provides for action by the Railroad Labor Board upon their application. The act of Congress approved August 5, 1919, Chap. 6, Sec. 38, 36 Stat. 112 and the act approved October 3, 1913, Chap. 16, subd. G. A. (38 Stat. 172), expressly exempt labor unions from excise taxes. Periodical publications issued by or under the auspices of trades unions are admitted into the mails as

second-class mail matter. Acts of 1911-1912, Chap. 389 (37 Stat. 550). The legality of labor unions of postal employees is expressly recognized by act of Congress, approved August 24, 1912, Chap. 389, Sec. 6 (37 Stat. 539, 555).

In *Arthur v. Oakes* (63 Fed. Rep. 310, 324, 329), Mr. Justice Harlan, with whom concurred Circuit Judge Woods and District Judge Bunn, said:

Some reference was made in argument to the act of Congress of June 29, 1886, legalizing the incorporation of national trades-unions (24 Stat. 86, c. 567). It is not perceived that this reference is at all pertinent to the present discussion. That act does not in any degree sanction illegal combinations. It recognizes the legal character of any association of working people having two or more branches in the states or territories of the United States, and established "for the purpose of aiding its members to become more skillful and efficient workers, the promotion of their general intelligence, the elevation of their character, the regulation of their wages and their hours and conditions of labor, the protection of their individual rights in the prosecution of their trade or trades, the raising of funds for the benefit of the sick, disabled, or unemployed members or the families of deceased members, or for such other object or objects for which working people may unlawfully combine, having in view their mutual protection or benefit." Associations of that character are authorized to make and establish such constitutions, rules,

and by-laws as they deem proper to carry out their lawful objects. Those objects, as defined by Congress, are most praiseworthy, and should be sustained by the courts whenever their power to that end is properly invoked.

F.

**THE RAILROAD LABOR BOARD HAD POWER TO CONSIDER
THE DISPUTE WHICH PROPERLY CAME BEFORE IT.**

Section 301 is as follows (41 Stat. 469):

It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute.

Counsel maintain that the Labor Board was hearing the dispute under Section 301 alone, which, they say, requires a joint submission, and there was none.

Section 301 is a proclamation by the Congress of the public policy of the United States that carriers and their officers, employees, and agents shall settle their disputes in conference between their respective repre-

sentatives. Failing so to decide the dispute, it is provided that the dispute shall then be referred by the parties thereto to the Labor Board, which "under the provisions of this title" (not under the provisions of section 301 alone) "is authorized to hear and decide such disputes."

Title III contains no provision for any *joint* submission of any kind under section 301 alone and the court will never read such a provision into the act by implication. As was said by Representative Esch, "It might be impossible to get the machinery started if both parties to the dispute had to jointly make application."

The Court of Appeals held (282 Fed. Rep. 706):

Section 301, by its terms, is applicable to "any dispute between the carrier and the employees." If the concluding sentence of the section, providing that in case the dispute is not decided in conference, it shall be referred "by the parties" thereto to the Board authorized to deal with the dispute, means that unless *both* parties agree so to refer it, the Board can not, in any event, deal with the matter, Title III might as well not have been enacted; for if the right of the Board to act depended upon the joint submission of the parties to the dispute, it lay in the power of either party to block utterly any action by the Board, by simply refusing to join in the submission.

The dispute both as to wages and rules and working conditions was pending before the railroads were

relinquished from Federal control. On the day it was organized the Labor Board inherited the dispute. The entire controversy appears to have been carried on before the Labor Board with the common consent of all of the parties for a considerable length of time. The Labor Board decided the question of the wages, deferred the question of rules and working conditions, and sent the parties to conference. The conference was an interminable disagreement and the parties were in a hopeless deadlock. In that state of the dispute the Federated Shop Crafts of the Pennsylvania System (System Federation No. 90) made an *ex parte* submission of the question of the right of a majority of the employees of any craft on the Pennsylvania System to designate an organization to represent the employees in negotiating an agreement with the carrier covering rules and working conditions (Tr. 92). If there is any question that the dispute was not already duly pending before the Labor Board, that *ex parte* submission settled it and the Board had jurisdiction to act.

Nevertheless, the Pennsylvania Company maintains that, under those circumstances, the conference was still pending under Section 301. If its contention is correct, the conference will remain pending there until the employees give in.

Subsequently, in that same *ex parte* proceeding and under the same title as the *ex parte* submission of the Federated Shop Crafts, the Pennsylvania Company filed a written application in behalf of itself and its subsidiary lines, in which it asked the Labor

Board to vacate and set aside Decision No. 218 and to decide and declare certain provisions in accordance with the Company's contentions then advanced (Tr. 106).

Notwithstanding all of this, the Company still maintains the dispute was still in conference between the parties under Section 301 and that there was no dispute properly pending before the Labor Board in accordance with the provisions of Title III.

It does not appear in any of the decisions or proceedings before the Labor Board that the System Federation No. 90 ever sought to invoke the jurisdiction of the Board under Section 301, or that the Board decided, or attempted to decide, the dispute under Section 301. On the contrary, it conclusively appears, and the course of conduct of the representatives of the Company alone demonstrates, that the parties were in a hopeless deadlock and the Labor Board was merely exerting its offices to bring them together for the purpose of an agreement. To that end the Labor Board prescribed a fair and harmless ballot for use in an election of representatives of System Federation No. 90 who might confer with the representatives of the Pennsylvania Company.

On the subject of the attempt of the Pennsylvania company to dictate the conduct of the election of the employees' representatives, the Court of Appeals said (282 Fed. Rep. 710):

Decision No. 119 directed that the employees choose representatives to confer with the carriers, and Decision No. 218 directed the

employees to hold an election. This suggests the thought that it is not for the employer to complain of Decision No. 218 directing the employees to hold this election. The directed participation of the employer was to enable it to know whether the election was fairly conducted, that all have opportunity to vote, and the ballots cast be truly counted. True it is, that if the employees select as their representatives System Federation No. 90 or some other organization, the carrier may decline to confer. The carrier might also decline to confer with individual representatives for any reason, sound or capricious, the color of their hair or their eyes, or the cut of their clothes; or it might in the first instance give ultimatum to the employees that it would not confer with representatives who had not been in their employ for ten years, or impose any other conditions, reasonable or not. This is merely to state that when representatives are selected either of the parties may, for any cause or no cause at all, decline to enter into conference with them. As applied to this situation it would simply mean that the board had failed in its effort to dispose of a pending dispute by effecting an agreement between the parties interested, with the result that the dispute still remains with the board just as if it had not undertaken to bring the parties to a mutual understanding.

Query: In repudiating the ballot and the offices of the Labor Board in seeking to bring the parties together for a conference, and "in the active promul-

gation of propaganda, * * * in which the issues involved in this controversy have been misstated and the action and position of the Railroad Labor Board grossly misrepresented," were the Pennsylvania Company and its officers carrying out the mandate of Congress "to exert every reasonable effort and adopt every available means to avoid any interruption to the operation" of the carrier growing out of the dispute, in accordance with the proclamation of Congress of the public policy of the United States?

The learned Circuit Judge holding the District Court held that the decisions of the Labor Board "are only advisory" (282 Fed. Rep. 699). If there is no order upon which the decree of the court may effectively operate, and the decree must run against the individual members of the Board to enjoin them from acting, then it seems necessarily to follow that any opinion and decree of the court must likewise be only advisory, with the result that *advisory* opinions follow in a series.

If the members of the Labor Board may be enjoined from announcing decisions for violation of which no penalty is imposed and for the enforcement of which no judicial machinery is provided, it is obvious that there is nothing left of the Labor Board.

VII.

CONCLUSION.

If the District Court was without jurisdiction to entertain the bill, then the judgments of both courts below should be reversed and the cause remanded with directions to the District Court to dismiss the bill *for want of jurisdiction*. See *Procter & Gamble Co. v. United States*, 225 U. S. 282, 301, 302.

If the District Court had jurisdiction to entertain the bill, then the decree of the District Court was wrong, the judgment of the Court of Appeals was right, and the latter should be affirmed.

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JAMES M. BECK,

Solicitor General.

BLACKBURN ESTERLINE,

Assistant to the Solicitor General.

APPENDIX A.

(Ante, p. 2.)

**TITLE III.—DISPUTES BETWEEN CARRIERS AND THEIR
EMPLOYEES AND SUBORDINATE OFFICIALS (41 STAT.
469).**

SEC. 300. When used in this title—

- (1) The term "carrier" includes any express company, sleeping-car company, and any carrier by railroad, subject to the Interstate Commerce Act, except a street, interurban, or suburban electric railway not operating as a part of a general steam railroad system of transportation;
- (2) The term "Adjustment Board" means any Railroad Board of Labor Adjustment established under section 302;
- (3) The term "Labor Board" means the Railroad Labor Board;
- (4) The term "commerce" means commerce among the several States or between any State, Territory, or the District of Columbia and any foreign nation, or between any Territory or the District of Columbia and any State, or between any Territory and any other Territory, or between any Territory and the District of Columbia, or within any Territory or the District of Columbia, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign nation; and
- (5) The term "subordinate official" includes officials of carriers of such class or rank as the Com-

mission shall designate by regulation formulated and issued after such notice and hearing as the Commission may prescribe, to the carriers, and employees and subordinate officials of carriers, and organizations thereof, directly to be affected by such regulations.

SEC. 301. It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute.

SEC. 302. Railroad Boards of Labor Adjustment may be established by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof.

SEC. 303. Each such Adjustment Board shall, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon the written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, (3) upon the Adjustment Board's own motion, or (4) upon the request of the Labor Board whenever such board is

of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving only grievances, rules, or working conditions, not decided as provided in section 301, between the carrier and its employees or subordinate officials, who are, or any organization thereof which is, in accordance with the provisions of section 302, represented upon any such Adjustment Board.

SEC. 304. There is hereby established a board to be known as the "Railroad Labor Board" and to be composed of nine members as follows:

(1) Three members constituting the labor group, representing the employees and subordinate officials of the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by such employees in such manner as the Commission shall by regulation prescribe;

(2) Three members, constituting the management group, representing the carriers, to be appointed by the President, by and with the advice and consent of the Senate, from not less than six nominees whose nominations shall be made and offered by the carriers in such manner as the Commission shall by regulation prescribe; and

(3) Three members, constituting the public group, representing the public, to be appointed directly by the President, by and with the advice and consent of the Senate.

Any vacancy on the Labor Board shall be filled in the same manner as the original appointment.

SEC. 305. If either the employees or the carriers fail to make nominations and offer nominees in accordance with the regulations of the Commission, as

provided in paragraphs (1) and (2) of section 304, within thirty days after the passage of this Act in case of any original appointment to the office of member of the Labor Board, or in case of a vacancy in any such office within fifteen days after such vacancy occurs, the President shall thereupon directly make the appointment by and with the advice and consent of the Senate. In making any such appointment the President shall, as far as he deems it practicable, select an individual associated in interest with the carriers or employees thereof, whichever he is to represent.

SEC. 306. (a) Any member of the Labor Board who during his term of office is an active member or in the employ of or holds any office in any organization of employees or subordinate officials, or any carrier, or owns any stock or bond thereof, or is pecuniarily interested therein, shall at once become ineligible for further membership upon the Labor Board; but no such member is required to relinquish honorary membership in, or his rights in any insurance or pension or other benefit fund maintained by, or any organization of employees or subordinate officials or by a carrier.

(b) Of the original members of the Labor Board, one from each group shall be appointed for a term of three years, one for two years, and one for one year. Their successors shall hold office for terms of five years, except that any member appointed to fill a vacancy shall be appointed only for the unexpired term of the member whom he succeeds. Each member shall receive from the United States an annual salary of \$10,000. A member may be removed by the President for neglect of duty or malfeasance in office, but for no other cause.

SEC. 307. (a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any Adjustment Board certifies to the Labor Board that in its opinion the Adjustment Board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any Adjustment Board has so failed or is not using due diligence in its consideration thereof. In case the appropriate Adjustment Board is not organized under the provisions of section 302, the Labor Board, (1) upon the application of the chief executive or any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in section 301 and which such Adjustment Board would be required to receive for hearing and decision under the provisions of section 303.

(b) The Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for

Adjustment Boards and the public may be properly informed;

(4) May make regulations necessary for the efficient execution of the functions vested in it by this title; and

(5) Shall at least annually collect and publish the decisions and regulations of the Labor Board and the Adjustment Boards and all court and administrative decisions and regulations of the Commission in respect to this title, together with a cumulative index-digest thereof.

SEC. 309. Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel.

SEC. 310. (a) For the efficient administration of the functions vested in the Labor Board by this title, any member thereof may require, by subpoena issued and signed by himself, the attendance of any witness and the production of any book, paper, document, or other evidence from any place in the United States at any designated place of hearing, and the taking of a deposition before any designated person having power to administer oaths. In the case of a deposition the testimony shall be reduced to writing by the person taking the deposition or under his direction, and shall then be subscribed to by the deponent. Any member of the Labor Board may administer oaths and examine any witness. Any witness summoned before the board and any witness whose deposition is taken shall be paid the same fees and mileage as are paid witnesses in the courts of the United States.

(b) In case of failure to comply with any subpoena or in case of the contumacy of any witness appearing

before the Labor Board, the board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof.

(c) No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, as to which in obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

SEC. 311. (a) When necessary to the efficient administration of the functions vested in the Labor Board by this title, any member, officer, employee, or agent thereof, duly authorized in writing by the board, shall at all reasonable times for the purpose of examination have access to and the right to copy any book, account, record, paper, or correspondence relating to any matter which the board is authorized to consider or investigate. Any person who upon demand refuses any duly authorized member, officer, employee, or agent of the Labor Board such right of access or copying, or hinders, obstructs, or resists him in the exercise of such right, shall upon conviction thereof be liable to a penalty of \$500 for each such offense. Each day during any part of which such offense continues shall

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(4) May make regulations necessary for the efficient execution of the functions vested in it by this title; and

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(b) In case of failure to comply with any subpoena or in case of the contumacy of any witness appearing

before the Labor Board, the board may invoke the aid of any United States district court. Such court may thereupon order the witness to comply with the requirements of such subpoena, or to give evidence touching the matter in question, as the case may be. Any failure to obey such order may be punished by such court as a contempt thereof.

(c) No person shall be excused from so attending and testifying or deposing, nor from so producing any book, paper, document, or other evidence on the ground that the testimony or evidence, documentary or otherwise, required of him may tend to incriminate him or subject him to a penalty or forfeiture; but no natural person shall be prosecuted or subjected to any penalty or forfeiture for or on account of any transaction, matter, or thing, as to which in obedience to a subpoena and under oath, he may so testify or produce evidence, documentary or otherwise. But no person shall be exempt from prosecution and punishment for perjury committed in so testifying.

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constitute a separate offense. Such penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.

(b) Every officer or employee of the United States, whenever requested by any member of the Labor Board or an Adjustment Board duly authorized by the board for the purpose, shall supply to such board any data or information pertaining to the administration of the functions vested in it by this title, which may be contained in the records of his office.

(c) The President is authorized to transfer to the Labor Board any books, papers, or documents pertaining to the administration of the functions vested in the board by this title, which are in the possession of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act and which are no longer necessary to the administration of the affairs of such agency.

SEC. 312. Prior to September 1, 1920, each carrier shall pay to each employee or subordinate official thereof wages or salary at a rate not less than that fixed by the decision of any agency, or railway board of adjustment in connection therewith, established for executing the powers granted the President under the Federal Control Act, in effect in respect to such employee or subordinate official immediately preceding 12.01 a. m. March 1, 1920. Any carrier acting in violation of any provision of this section shall upon conviction thereof be liable to a penalty of \$100 for each such offense. Each such action with respect to any such employee or subordinate official and each day or portion thereof during which the offense continues shall constitute a separate offense. Such

penalty shall be recoverable in a civil suit brought in the name of the United States, and shall be covered into the Treasury of the United States as miscellaneous receipts.

SEC. 313. The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion, after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine.

SEC. 314. The Labor Board may (1) appoint a secretary, who shall receive from the United States an annual salary of \$5,000; and (2) subject to the provisions of the civil-service laws, appoint and remove such officers, employees, and agents; and make such expenditures for rent, printing, telegrams, telephone, law books, books of reference, periodicals, furniture, stationery, office equipment, and other supplies and expenses, including salaries, traveling expenses of its members, secretary, officers, employees, and agents, and witness fees, as are necessary for the efficient execution of the functions vested in the board by this title and as may be provided for by Congress from time to time. All of the expenditures of the Labor Board shall be allowed and paid upon the presentation of itemized vouchers therefor approved by the chairman of the Labor Board.

SEC. 315. There is hereby appropriated for the fiscal year ending June 30, 1920, out of any money in the Treasury not otherwise appropriated, the sum of \$50,000, or so much thereof as may be necessary, to

be expended by the Labor Board, for defraying the expenses of the maintenance and establishment of the board, including the payment of salaries as provided in this title.

SEC. 316. The powers and duties of the Board of Mediation and Conciliation created by the Act approved July 15, 1913, shall not extend to any dispute which may be received for hearing and decision by any Adjustment Board or the Labor Board.

APPENDIX B.

(Ante, p. 24.)

Report on "labor provisions" of Senate Committee on Interstate Commerce by Senator Cummins, November 10, 1919:

It is not necessary to enter upon the details of the establishment of the tribunals created for the adjudication of demands, disputes, and controversies which may arise from time to time between railway corporations and railway employees. These provisions will be found in sections 25, 26, 27, and 28 of the bill. It is sufficient to say that there are to be appointed three regional boards of adjustment and a committee of wages and working conditions. These four tribunals, made up in each instance of an equal number of men nominated by railway crafts and railway corporations, have original jurisdiction of all complaints, demands, disputes, and controversies between employers and employees which are not adjusted or settled between the parties themselves. In the event of the failure of these boards of adjustment or the committee of wages and working conditions to reach a decision, the transportation board has final authority; and, indeed, all decisions of these boards or the committee must be approved by the transportation board. It is intended in these sections to

bring into existence governmental tribunals so composed that, in so far as mortal man can do justice, there will be complete, impartial justice done to both railway corporations and railway employees and to the public as well.

Hitherto the Government has not undertaken to adjudge the disputes which have so disturbed the field of transportation and which promise to be still more serious in the future than they have been in the past. All that legislation has done up to this time has been to authorize mediation and conciliation and to present an opportunity for voluntary arbitration. After the most careful consideration, it is the judgment of the committee that the time has come to make another advance in the settlement of disputes likely to end in the suspension or restraint of transportation. This forward step must be clearly understood in order to be justly considered. In a controversy between railway workers and railway managers with respect to wages and working conditions and which could only be settled by agreement between the disputants, the right to strike—that is, a concerted cessation of work—seems inevitable; for it is the only weapon which the workers could effectually employ. A proposal to prohibit an agreement among workers to quit their employment at a given time without substituting some other instrumentality for securing justice would not receive at the hands of Congress a moment's consideration. In making the strike unlawful, it is obvious that there must be something given

to the workers in exchange for it. The thing substituted for the strike should be more certain in attaining justice and should do what the strike can not do; namely, protect the great masses of the people who are not directly involved in the controversy. The committee has substituted for the strike the justice which will be administered by the tribunals created in the bill for adjudging disputes which may hereafter arise.

From the public standpoint and in the interest of the people generally, it has become perfectly clear that, in transportation, at least, both the strike and the lockout must cease. This country has been so developed, its population is so situated, its commerce so crystallized that regularity and continuity in transportation have become absolutely indispensable to the lives and health of the people and the existence of our industrial and commercial welfare. A general suspension in the movement of traffic for a fortnight would starve or freeze, or both, a very large number of men, women, and children; and, if it were continued a month or two months, it would practically destroy half our population. Our business affairs would be so disordered that the loss would be greater than in any conceivable war in which we might engage. It is just as much the function of the Government in these circumstances to see to it that transportation is adequate, continuous, and regular as it is to maintain order, punish crime, and render justice in any other field of human activity. It is clear, therefore,

that the Government must settle the controversies between railway managers and railway employees which, if left to be fought out between the parties themselves, will lead to the consequences just described. There is but one way in which this can be done: The Government must undertake to declare, in any such case, what is justice, what is fair and right between the parties to the dispute, and then there must be no concerted rebellion or conspiracy among those whose rights have been adjudged for the purpose of coercing either of the parties to the dispute into another and different settlement.

The railway unions are especially opposed to these provisions of the bill, and the committee addresses a word directly to them. In the step the committee has taken there is no hostility to unionized labor; no opposition to collective bargaining. Indeed, the unions and collective bargaining are necessary parts of the plan suggested in the bill. The unions can be more effective in securing justice under the proposed arrangement than they ever have been through the strike, for after all, even the most zealous of the union leaders must admit that their efforts through the strike, from their own standpoint, have substantially failed. The existing complaints with respect to wages and working conditions must be sufficient evidence to these leaders that they have not been able to attain their objects in the old way. Why not, then, exchange the instrumentality which they are now insisting upon and which can be tolerated no longer in a free country for

a better one; namely, the justice of an impartial governmental adjudication? The committee is aware that the union leaders feel that they can not hope for justice from the Government, but in the opinion of the committee this distrust has no foundation and ought to give way to confidence and hope. If we can not organize tribunals which will do justice to employees, employers, and to the public in a business which so vitally affects the welfare of the Nation, then the Government is a complete failure and free institutions must be abandoned as an unsuccessful experiment. The committee believes that, when the heat of the immediate conflict over this legislation has subsided, a great majority of the railway workers will hail the substitution of intelligent and impartial tribunals, which will render justice to them, for the right to enter into an agreement or combination to destroy transportation as a deliverance, and as a better way to secure what rightly belongs to them than the methods which they have heretofore employed.

APPENDIX C.

(Ante, p. 24.)

Senator Cummins (Iowa), who had charge of the bill in the Senate, made the following statement concerning Title III, February 23, 1920, on the conference report of the two Houses (Cong. Rec., vol. 59, pt. 4, p. 3328):

Fifth. The Senate conferees discovered very early in the conference that the House would not accept that part of the Senate bill which undertook to create tribunals for the adjudication of disputes between railway employees and railway employers, and to make it unlawful, through combination or conspiracy on the part of either employees or employers, to punish the public in order to maintain their disputes.

I confess that I yielded upon these provisions of the Senate bill with extreme reluctance. The procedure established in our bill may have been susceptible of improvement, but the principle is everlastingly right. That there will come a time when railway workers will see that this principle protects them more perfectly than they can ever hope to be protected through the strike, I have no more doubt than I have in the ultimate triumph of justice in all the fields of human endeavor. Is it not possible that in the progress of affairs we can discover some way in which to prevent these disputes ripening into an interruption

of commerce which menaces the lives, the health, and the peaceful, orderly development of society? To me the thought is abhorrent that the judgment of a governmental tribunal composed of fair, high-minded men—a tribunal which takes into consideration the rights of man and speaks for the public welfare—can be overthrown or disregarded by any class of our citizens. Whenever the public interest requires the Government to assume jurisdiction over a dispute and to enter its decree expressing the very right of the matter, all of us, no matter how we work or where we work, ought to respect and abide the decision.

So much I have felt that I must say in vindication of the action of the Senate in receding from the so-called "antistrike" sections of the Senate bill. The Senate conferees yielded simply to supreme necessity, for we all recognized that a railroad bill must be passed before March 1, or chaos would ensue.

With respect to the labor provisions of the conference report, I am utterly unable to understand the opposition which they have aroused among labor leaders, for they leave all men free, whether employees or employers, to do whatsoever they please at any time, at any place, or under any circumstances. All that I can say of them is that they are the best we could devise under the conditions which confronted us.

The voluntary formation of boards of adjustment to consider and settle, if possible, all disputes except those relating to wages is authorized and encouraged.

A governmental tribunal is established, composed of nine members, with a tenure of office of five years and an annual compensation of \$10,000. It is to be known as the "railroad labor board." All of the members are to be appointed by the President and confirmed by the Senate—three of its members upon the nomination of employees, three upon the nomination of the employers, and three, without restriction, to represent the public. All controversies respecting wages or salaries are to be submitted to this board, and also all other disputes not decided by the boards of adjustment which seem likely to result in a substantial interruption of commerce. Decisions by the railroad labor board are to be made by a majority vote, but no decision can be made unless at least one of the members representing the public joins in the decision. It is my sincere hope that this board may command the confidence of railway wageworkers, railway carriers, and above all, the public. I earnestly hope that through its intervention justice may be done, and especially that the wageworkers shall receive that full measure of compensation which alone can make men happy, contented, and progressive. Let us at least try the experiment with faith and courage in the abiding belief that whatever defects may be revealed in the plan as time passes on we will have the intelligence and patriotism to remove.

APPENDIX D.

(As to, p. 26.)

Statement, February 21, 1921, of the managers on the part of the House at the conference on the disagreeing votes of the two Houses (Cong. Rec., vol. 59, pt. 4, p. 3260, Title III, p. 3262):

The House bill limited the disputes which were to be considered under its labor provisions to those involving employees who are members of certain specified railroad brotherhoods and shopmen's unions. The Senate amendment provided for the consideration of disputes of all employees and subordinate officials of carriers, organized or unorganized. The bill agreed to by the conferees provides for the adjustment of disputes of all railroad employees, not only members of the four brotherhoods or the shopmen's union, but also of other railroad labor organizations. Unorganized employees and employees of sleeping-car or express companies and subordinate officials are also included. The officials included within this last term are to be determined by the commission under the authorization of paragraph (5) of section 300.

The House bill established three adjustment boards, comprised of an equal number of the representatives of the specified railway brotherhoods and shopmen's unions and the railroads appointed directly by the employees

and carriers. Such adjustment boards were authorized to receive disputes of any kind for consideration if both the railroad and the employees jointly agreed to submit the dispute to the consideration of the proper adjustment board. If the adjustment board, failed or refused to decide the dispute, either half of the members of the board might refer it to a corresponding appeal commission composed in the same manner as the adjustment board.

The Senate amendment placed disputes in two classes, those relating to wages and working conditions and those relating to grievances and matters of discipline. The latter class of disputes were to be considered by local regional boards of adjustment comprised of an equal number of representatives of labor and the carriers, appointed by the transportation board from nominees presented by the carriers and their employees. There was further created and established a committee of wages and working conditions formed in the same manner. This committee had original jurisdiction over all disputes involving wages and working conditions and the power to amend or disapprove the decisions of the regional boards for the purpose of securing uniformity of practice. The Senate amendment provided special temporary tribunals for the considerations of disputes of subordinate officials. Finally, disputes as to grievances and matters of discipline which the regional boards failed to decide might be referred to the committee on wages and working conditions, and all

decisions of the committee on wages and working conditions were denied effect until approved by the transportation board.

The conference bill (see section 302) permits the formation by agreement between the carriers and their employees of voluntary adjustment boards with jurisdiction over disputes involving grievances, rules, or working conditions. There is further established a railroad labor board composed of nine members appointed by the President, by and with the advice and consent of the Senate, three from nominees offered by the carriers, three from nominees offered by the employees of the carriers, and three to be directly appointed and to be representatives of the public (see section 304). The railroad labor board has exclusive jurisdiction over disputes involving wages and also of disputes involving grievances, disputes, and working conditions in case no adjustment board has been formed by the carriers and employees who are parties to such dispute. The railroad labor board has appellate jurisdiction upon its own motion or upon the request of an adjustment board in case such adjustment board is formed but fails to decide such disputes.

The House bill provided for no representation of the public upon any of its boards or commissions. The Senate amendment subjected all decisions of its tribunals to review by a public board, the transportation board. The conference bill (see section 307 (c)) provided for appointment of members to represent the public along with those representing the

carriers and employees upon its supreme tribunal and, moreover, requires that though a decision may be reached by a majority vote, nevertheless a decision in respect to wages is not effective unless at least one of the public representatives concurs therein.

The House bill made it the duty of carriers and their employees to take all possible means to adjust their differences in the first instance before referring the dispute to any adjustment board. The Senate amendment had no provision upon this subject. The conference bill contains a declaration, similar to that in the House bill, directing the officials of a carrier and their employees to appoint representatives to confer over all matters of dispute. In case of the failure of such conference, the House bill provided that no dispute should come within the jurisdiction of an adjustment board unless both the carriers and the employees jointly agreed to submit it to the adjustment board. The Senate amendment permitted disputes to reach a regional board or the committee of wages and working conditions upon the application of either party to the dispute, but made no provision for any action by any tribunal upon its own initiative. The provisions of the conference bill (see section 307 (a) and (b)) permit action by the railroad labor board not only upon application of either party or by petition of unorganized employees but also upon the adjustment board's or the railroad labor board's own motion.

The House bill made permanent all decisions issued by the Railroad Administration or the adjustment boards in connection therewith in respect to wages and working conditions. The Senate amendment had no provision upon this subject. The bill of the conferees, however (see section 312), forbids the carrier to reduce wages agreed to under such decisions during the guaranty period only.

The House bill contained no enforcement provisions, but relied on the voluntary observance by the parties of all decisions made by them. A blanket penalty was contained in the House bill, but there were no corresponding duties save that representatives upon the boards and commissions "shall" reach a decision, to which the penalty applies. The Senate amendment made extensive use of criminal penalties to enforce all decisions of its tribunals and provided for a fine of \$500 or imprisonment not exceeding six months for any carrier or official thereof who fails to obey any decision of its tribunals and for any person who enters into a conspiracy to restrain the operation of trains in interstate commerce. The conference bill contains no penalty provisions for a violation of a decision of the railroad labor board, but provides that all decisions shall be given extensive publicity. There is a further provision—see section 313—that the railroad labor board may, after notice and hearing, determine whether any decision by an adjustment board has been violated by either party to which the decision applies. In case the railroad labor board determines that such

violation occurs, it may make public such findings in such manner as it may determine.

The House bill provides for the transfer to the adjustment boards and appeal commissions of certain records of the board of mediation and conciliation, established under the Newlands Act, but both the House bill and Senate amendment permit the general jurisdiction of that board over all railroad labor disputes to remain. The conference bill, however, denies jurisdiction of the board of mediation and conciliation over any dispute which may be adjusted by the adjustment boards or the railroad labor board.

APPENDIX E.

(Ante, p. 37.)

Representative Andrews (Nebraska), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8492, 8493):

The three propositions before us for the adjustment of disputes between carriers and their employees call for very careful, thoughtful consideration. I want to congratulate the country and the House upon the work that has been performed by the Committee on Interstate and Foreign Commerce. It has been my privilege to attend some of the hearings. The careful consideration given by the members of the committee to these important questions surely has challenged the admiration of all. The absence of factional, sectional, and partisan prejudice will go a long distance toward a wise solution of these questions. I hope that when we come to the final decision we may be able to dismiss from our minds elements of prejudice in regard to the old controversies that have gone before. We are in the midst of a new era, and certain lines of thought and action are clearly revealed in public opinion as never before.

* * * * *

This bill and the pending amendments require us to make a choice between compulsory and voluntary arbitration. The Webster

substitute proposes compulsory arbitration and outlines the methods of its enforcement. Let us remember that our decision in this matter will not apply to all the laboring forces of the United States. This bill deals with the railroad employees alone. Is it wise and just at this time to force upon them rigid requirements from which a considerable majority of the laboring people of the country will be entirely free? Recent strikes have appeared among those who will not be affected by the terms of the law which we are about to enact. For this and other reasons I shall support the principle of voluntary arbitration.

The numerous boards proposed by the terms of the bill and also the Anderson or Sweet amendment do not give proper recognition to the public in the adjustment of labor disputes. They are both based largely upon the erroneous notion that labor disputes are to be solved entirely by the employers and employees. In most instances the boards proposed by the bill and the Anderson amendment are given equal representation from the employers and employees. That condition makes it possible to perpetuate a controversy indefinitely, while public interests may suffer seriously thereby. The plan seems to be based upon the theory that each dispute must be decided by the unanimous vote of each board or not decided at all. If the public, however, were given representation on each of these boards it could make a decision and thereby avoid delay and injury to the public. It is frequently suggested that the public has

no right to speak in a quarrel between employers and employees. That opinion should be promptly repudiated as harmful in the highest degree. If the employees think they are entitled to an increase of wages and refuse to yield their point in the midst of the deliberations of the board, the employers may grant the increase and immediately thereafter advance their rates. Will anyone deny that the public is interested at this point? If so, he would argue that the employers and employees can quarrel among themselves until they are weary of their quarrel and then charge millions in increased rates to the public as a peace offering. In all of these disputes the public as a rule must pay the bills.

It is wrong for anyone to assume that railroads have a right to levy exorbitant rates upon the public as a means of settling quarrels.

There must be an equalizing agency, and the public, which is the paymaster in the end, should be given a voice and a vote in the determination of these disputes.

* * * * *

Now, the public comes to the Congress of the United States to speak upon this question in relation to capital on the one hand and labor on the other. The public is now an active partner. It has assumed control, and its duty is to exercise control over labor and capital alike on the grounds of justice and equity.

In this connection I want to emphasize this central idea, that labor and capital have no

right to trespass upon the superior rights of the public. Each must answer to those superior rights. For years, however, the world has gone forward upon the assumption that these labor disputes are questions to be debated between labor and capital only—the employer and the employee. This bill and these amendments—and I hope that those who have charge of the bill and the amendments will note the point—all convey the idea that the public is a minor factor in this problem. In my judgment it is, and always should be, the major factor and should speak for all, but speak on the lines of justice and equity. We have had an illustration of this in recent days.

Have you heard the voice of the public? Certainly. Was it not an inspiring scene when the Congress of the United States and the President of the United States stood forth before the people of the Nation and the world as a unit, asserting the rights of the public in saying to the coal strikers, "Thus far and no further"? Now, let the public also say, with the returning days of quiet and order, to the employer as well as to the employee, "Let these questions of wages and conditions of labor be adjusted at the council table, where reason, justice, and equity preside in the absence of prejudice and passion."

Representative Sweet (Iowa), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8493):

Mr. Chairman and gentlemen of the committee, the title of the bill we are now considering is one of the most important in the

bill, because it relates to human rights. The times are menacing, chaotic, and uncertain, and seem out of joint, and yet we are not legislating in this bill to meet the present situation or an emergency. We are legislating for days of peace. We are legislating for the employees of the railway carriers of this country. We are not legislating for all the laborers of this country. I emphasize the fact, we are legislating in regard to those that are in the employ of the carriers. We are not legislating for anarchists, I. W. W.'s, or Bolsheviks. We are legislating for American citizens. And I can say without fear of successful contradiction that the men who have been in the employ of the carriers of this country during the war that has just closed showed as much patriotism as any other class of citizens in the Republic.

* * * * *

In approaching this proposition I want to say to you that I stand here ready to support any plan or scheme that will make the railroads effective in operation and management, and I desire that harmony may exist between the carriers and their employees. And although we may differ in many respects in connection with this proposition, it is largely a question of judgment. Some men wish to approach this proposition from the standpoint of force.

To them I will say that force has been tried in many European countries and has met with almost universal failure. It is an Old World idea. Some of them approach it from the

standpoint of taking from those who are employed the accumulations of almost a lifetime, the small amount laid aside for the support and maintenance of their wives and children. To them I will say I do not believe that is wise policy, and neither is it humanitarian. The plan that has been suggested here by the gentleman from Minnesota [Mr. Anderson] was one that I had worked out and presented to the committee.

* * * * *

Now, the plan that is here presented is simply this: During the period of Federal control certain boards of adjustment were agreed to between the railway companies and the employees, and were known as Adjustment Board No. 1, Adjustment Board No. 2, and Adjustment Board No. 3. Upon these boards there was an equal representation. And I may say to the Members of the House that before Adjustment Board No. 1 there came over 1,360 disputed questions, and of that number 1,300 were decided by a unanimous board, and all were finally adjusted by the board, constructed upon the same basis as is presented here under the Anderson amendment.

The basic or the central thought of this plan is that there is equal representation. The representation comes from those who are interested, and they get around the council table and discuss these matters, touch elbow to elbow, and thrash out the proposition. That is the central thought. And not only that, it is done by men who understand disputes of this char-

acter. They are not strangers to it; they understand it. And so I provide in this plan three boards, identical with the three that are now established, and the theory of this plan from beginning to end is that it takes into consideration the present condition of the country and the status of the railway employees. It endeavors to apply the law to the facts. It does not present a theory and then try to adjust the facts to it. The framer of it has kept in mind at all times that labor is not a commodity or an article of commerce. And so this proposition that we are here presenting is not a theory. It has been actually put into practice. It has actually been tried. It has actually been demonstrated.

Representative Denison (Illinois), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8494, 8495, 8496, 8497):

Mr. Chairman and gentlemen, I want to be perfectly candid with the House in explaining the provisions of the committee bill on the adjustment of labor disputes and my own position on that subject. * * * Now, gentlemen, the Committee on Interstate and Foreign Commerce had before it all of these propositions. We heard those who believe in each of the propositions, and the committee had a great deal of trouble in arriving at its conclusions. The conclusions of the committee did not meet the individual views of all the members of the committee. I want to be candid and say that they did not meet my own personal views entirely; but the plan of

the committee as embodied in the bill is the concensus of views of the majority of the Committee on Interstate and Foreign Commerce, and the very fairest and best plan that the committee as a whole could, under all the circumstances, formulate to solve this problem at this time.

Now, as everyone knows, the plan proposed by the gentleman from Minnesota [Mr. Anderson] is the plan proposed by those who represent the wishes of the brotherhoods and other railroad men. It provides simply for voluntary conciliation and arbitration by the various boards; it offers no means of enforcing agreements or awards, and provides no penalties whatever, either civil or criminal. If that is all the House wishes to do, it would be better, in my judgment, to strike the entire subject out of the bill.

The plan proposed by the gentleman from Washington [Mr. Webster] provides for arbitration by boards, but goes too far and provides both civil and criminal penalties. And not only that, gentlemen, but the plan proposed by the gentleman from Washington [Mr. Webster] would make every individual member of an organization whose members go out on a strike liable in damages whether that member favored the strike or not, and even though he might have opposed it. Why, gentlemen, if you know anything about labor conditions you know that men, as a matter of protection and for their own good, generally want and sometimes have to join these organizations. I believe in labor organizations and wish all men

in industrial employment belonged to them. But they generally decide questions involving strikes by a majority vote of the members of the organization, which is the usual method of doing such things in this country, and I can not bring myself to believe that it is right or just to punish those members of the organization who oppose a strike and do not help cause it or bring it on, simply because other members controlled the organization and brought on a strike which caused the damages. I am not in favor of going so far as to make the property of an innocent man liable for the damages caused by others who chose to vote to strike. * * * Now, the plan proposed by the committee takes the middle ground. We have tried to provide a plan that will be effective and yet will not be unjust or unfair to anyone. That is what we all ought to try to do.

Let me remind the Members of the House that this is the second experiment of Congress in legislating upon disputes between employers and employees. It is a new field for national legislative action in this country. We are in the experimental stage of such legislation. My own view is that it has been an unfortunate thing for the laboring men and for the country that labor disputes have ever reached the point where they had to be taken into the realm of legislation.

* * * * *

The question came before Congress for the first time in what is known as the Adamson law, that was passed, as you remember, just

before the national election in 1916. I voted for the Adamson bill because the brotherhoods and their employers failed or refused to adjust their differences and a Nation-wide strike was called and impending. The day and the hour for it was set; and, so far as I could tell, there was no hope of adjusting the dispute or averting what seemed to me a national disaster. I have always believed if the President had kept out of the dispute it would have been amicably settled. It was unfortunate for all parties concerned and for the country that a political campaign was approaching. But the President interfered, took sides with the brotherhoods, threw the great influence of his high office upon their side of the controversy, came before Congress with a special message demanding legislation, and advising Congress that there was no other way to avoid national disaster except by the passage of the Adamson bill.

I voted for the bill for that reason and because the officers of the brotherhoods in public statements announced that such a law would avert the strike.

I have always believed that the Adamson law was a mistake, not only for the country, but from the standpoint of the interests of the brotherhoods themselves as well. Nothing but the necessity for averting such a national disaster as the paralysis of the transportation systems of the entire country could have justified it.

But the bill passed and became the law of the land; its constitutionality was questioned

in a proceeding brought for that purpose, which was soon decided in the Supreme Court.

* * * * *

You will observe that the Supreme Court said that the question of settling labor disputes and adjusting wages is primarily a question between the carriers and their employes which they ought to adjust, and that so long as they do adjust them the public is not concerned; but that when they fail to adjust such disputes, then a public interest arises, and that Congress has absolutely plenary power to pass any law that may be effective to prevent interruptions of interstate commerce.

* * * * *

The decision in the Adamson case has settled the law and has decided as a constitutional question that when the employers and employees fail to reach an agreement, and that failure to reach an agreement is liable to result in an interruption of interstate commerce, Congress has full power to pass any law governing the relation of carriers and their employees that will prevent that interruption and protect the interests of the public. That is our power, and it is for the Members of Congress to decide what our duty is. The Supreme Court has told us plainly what our powers are under the Constitution. Each of us must decide what our duty is under our oath of office.

Now, this bill provides tribunals to settle all these labor disputes, tribunals that are as just, fair, and impartial as the members of

the committee could devise. We have followed suggestions that have been made to us by representatives of the brotherhoods. I do not mean that this plan in the bill has been recommended by the brotherhoods, but I mean that the principle involved in it has been recommended by the brotherhoods, at least to this extent:

They came before the committee and said to us that they thought the best way to settle these labor disputes is to get the men and their employers together around the table and let them discuss these questions as man to man, upon an absolutely equal footing; it was stated to us that then in ninety-nine cases out of one hundred they would agree; and they cited the fact that the labor-adjustment boards provided for by the Railroad Administration had been sitting during the two years of the war adjusting these disputes and had come to an agreement in every case. And I think they would continue to do so.

* * * * *

I think Congress will have done its duty to the country if we provide tribunals that are absolutely fair and impartial before whom they can take their disputes, man to man, on an equal footing, discuss them, and settle them.

* * * * *

Gentlemen, the responsibility for enacting railroad legislation rests upon us. The country expects us to do our duty and do all we can to foster and improve the transportation systems of the country and give the

people better and uninterrupted railroad service. I think that this plan of the committee is fair and conservative and will help to encourage the conciliation and friendly adjustment of all labor disputes between the railroad companies and their employees.

Representative Nolan (California), November 14, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8497):

Now, as to the Anderson amendment, I want to call the attention of some gentlemen who say there is no way to enforce the provisions of that amendment in case of a deadlock to the fact that for 23 years before we took the railroads over during the war emergency the railroad employees in this country sat around the table at a conference and settled their grievances with their employers—the railroad presidents and general managers. After a number of years had elapsed the Erdman Act was passed, and subsequently we passed the Newlands amendment to the Erdman Act, which provided for a conciliation board or an adjustment board provided the railroads and the employees could not agree. They had their grievance committees that took up the grievances in different parts of the country. In case they could not adjust or agree the board stepped in to settle it. There has never been a case where the employees refused to abide by the decision of that board. After 23 years, before we took over the railroads they went along without a strike or lockout.

I would like to leave this thought with the Members of the House: I am an executive officer in a large organization—the molder union. From 1890 annually men representing the molders meet with the men representing the stove foundries of the country who have a national organization—the Stove Foundries' National Defense Association—and they take seats at the round table and confer with the representatives of their men on the question of hours, wages, and working conditions that affect every stove foundry of the country. These conferences have been going on for 29 years without a break; there has never been a strike or lockout during that time of any consequence or that lasted more than a few days or weeks.

That is conciliation. That is exactly what I consider a common-sense method of adjusting disputes—getting the practical employee and the practical man from the industry, or their representatives, together and settling their disputes, and when they do settle them you have contented employees, you have contented employers. It means production, it means content, it means efficiency, and really it is the only common-sense way of settling disputes in this country or in any part of the world. The other method has been tried and it has failed. It has been tried in Europe, it has been tried in Australia, it has been tried in Canada, and there has never been an instance where force has been used, where the law has been invoked to send men to jail or penalize them for refusing to work, where it

has not failed. When this world and this country get back to a normal state of mind and we can sit calmly around the table and settle these industrial problems, my opinion is that the way to settle them will be found through conciliation. Common sense then prevails. Then there is confidence between the employer and the employee, and that is the foundation for our industrial structure. When we get to that point, and I am satisfied that we are going to get to it, no matter what we try in the way of compulsory legislation or compulsory labor, we will settle these disputes in the way I have suggested. The matter of industrial disputes in this country and in the world will find its foundation on a solid rock only when employer and employee get together and settle their differences in a calm, common-sense way.

Representative Cannon (Illinois), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, p. 8497):

Mr. Chairman, the Adamson bill was passed. I voted for it. The President made an address to the Congress, and I think most of you recollect it. I hold that address in my hand at this time. In that address to Congress, August 29, 1916, the President made six recommendations for legislation: First, the enlargement and administrative reorganization of the Interstate Commerce Commission; second, the establishment of the eight-hour day as the legal basis for work and wages of all railway employees engaged in interstate transportation; third, the authorization of a small body of men to observe the actual results of the eight-hour day

and report to Congress; fourth, approval of an increase of freight rates to meet such additional expenditures by reason of the eight-hour day; fifth, "an amendment of the existing Federal statute which provides for mediation, conciliation, and arbitration of such controversies as the present by adding to it a provision that in case the methods of accommodation now provided for should fail, a full public investigation of the merits of every such dispute shall be instituted and completed before a strike or lockout may lawfully be attempted"; and sixth, lodgment in the hands of the Executive of the power, in case of military necessity, to take control of the railways for military service.

* * * * *

I agreed with much that he recommended. The crops were just ready to move. A demand was made by the railroad employees for a certain increase of wages, to which the railroads would not agree, and, as gentlemen will recollect, the employees notified the country that they would go on a strike and tie up all of the commerce between the States—with the crops ready to move—and I live out in Illinois where the crops abounded then and do still. I voted for the Adamson bill, not that I loved it, but because it met an emergency, and we had the implied promise of a permanent system for the adjustment of such controversies. It was a condition that confronted us. The President made certain propositions that he thought ought to be enacted into law, that the whole matter ought to be determined by conciliation

and mediation. I do not object to that. I believe in conciliation and I believe in mediation, where employer and employee can not agree.

Representative Luce (Massachusetts), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 8498, 8499):

My warrant for addressing myself to this subject is the fact that some years ago duty brought to me an intensive study of one method to meet this situation. A voluminous correspondence, a visit to the country where the remedy I studied is in operation, conference with men of practical experience with it, have led me to the hope that I may be able to be of service to the House in some small degree by attempting to make clear the nature of the choice that now confronts us. There are three proposals among which to choose. At the one extreme is the proposal of the gentleman from Washington, which can be boiled down to two words—compulsory arbitration. At the other extreme is the proposal of the gentleman from Minnesota, which can be boiled down to two words—voluntary conciliation. In between is the proposal of the committee, which consists of voluntary mediation coupled with a provision for fulfillment of contract. There is a fourth method, the one with which I am particularly familiar, which, if the temper of the House should demonstrate it to be desirable, I may submit in the form of amendments to the committee bill at a later stage. At the moment I desire to oppose both of the amend-

ments and to urge the adoption of the committee bill.

First, then, take the extreme proposal of compulsory arbitration. Time does not permit me to consider it from an ethical, moral, political, or constitutional point of view. I must confine myself to the practical point of view. Regardless of theory, no matter what our own desires or the desires of a large part of the people, the unanswerable objection to compulsory arbitration is that it will not work. It has been tried now for many years in Australasia, and gentlemen who may have acquainted themselves with the more recent literature on the subject will have found that the steady tendency in New Zealand and the neighboring countries that have adopted it is toward its abandonment. They are restricting it more and more, making it the last resort.

A more definite rejoinder to the proposal is found in the recent experience of England, where compulsory arbitration was provided in 1914 under the munitions of war act, with a penalty upon any man who struck within 21 days before the dispute had been referred to the board of trade and within 21 days after its report. The result was that in the next 33 months more than 1,500,000 men struck in violation of the law. Had the fine of £5 for each day of strike been imposed on each striker, the penalties would have amounted to more than \$250,000,000. There was no attempt to collect the penalty in more than one-fifth of 1 per cent of the cases of violation of the law. If in war times, when the patriotic impulses of men

could be appealed to, there was this disastrous failure of compulsory arbitration, how is it possible to expect we can apply it here in peace times with any more satisfactory result? Again, I say, not because I oppose it on ethical, political, or constitutional grounds, but wholly by reason of the fact that the experience of the world is against it, I must be hostile to the plan embodied in this amendment.

Let us come to the other extreme—the proposition that we tinker up our laws some more in relation to mediation and conciliation.

One gentleman said that this kind of legislation is in the experimental stage. The first law upon this subject, so far as I recollect, was enacted in my own State of Massachusetts in the year 1886, 33 years ago. After 33 years of experiment and of constant attempt to perfect, that law is as useless for all important questions as it ever was. It serves a useful function. It is a good thing for minor cases. It straightens out a good many tangles. I say no word in criticism of the law or its actual test in my State beyond this, that it does not meet the great crises, and the great crises are those with which we are now trying to grapple.

In national affairs there have now been about 20 years of endeavor to employ this principle. There have been at least two, and I think three, attempts to make it workable in its Federal application. Yet you will find yourself confronted by the need of still more legislation.

You say the law has defects. We found in Massachusetts that it had defects. We

plugged up hole after hole, and still we found ourselves faced with the fact that the law does not tally with the instincts of human nature, with the workings of the human mind. I shall be very sorry, if, when the people ask for bread, we give them a stone—if our only reply is an attempt to fix up an inadequate law that can not in any case accomplish what is wanted, as experience has thoroughly demonstrated.

In between is the committee proposition. Do not understand that I commit myself as wholly in favor of that proposition. It has merit, and of the three it is decidedly the best. It tries to meet one very serious question, the question of whether contracts made by organizations of labor or by employers shall be kept. Who of the foes or friends of labor or of capital can deny the wisdom of the contention that the promises should be kept? If we do no more at this session, we should take that step. I favor the committee bill in this particular. But that bill does not fully meet the situation. It will remedy the situation only in part. If, perchance, the House should at this late stage be willing to consider the only remedy yet found anywhere in the world that has proved adequate, I should deem myself fortunate, indeed, if time permitted me to lay it before this committee.

Representative Wood (Indiana), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, p. 8500):

I have always understood that all that labor demanded was that its case should be heard

at first-hand. I am a friend of labor and a friend of the unions, and am a friend of collective bargaining, but when bargains are made they should be kept. My proposition provides that labor disputes shall be heard at first-hand by men eminently qualified to hear them. I have always understood that all they asked was that their rights might be determined at first-hand by somebody who is not prejudiced against them to begin with. That is provided in the amendment I have prepared, and in the event that something better is not found before the consideration of this measure is concluded I propose to offer the plan I have suggested.

Representative Bee (Texas), November 14, 1919
said (Cong. Rec., vol. 58, pts. 1-9, p. 8503):

You will have it (an era of peace), to some extent, however, when you create a board, no matter how constituted, to whom these questions may be submitted. I do not care whether their judgments are final or not, or whether there is the right of appeal or the power to enforce them, for I say to you that the force of public opinion will be the controlling element. The coal strike was settled, not entirely by the decision of Judge Anderson, but it was settled because the overwhelming public opinion of the country was against the coal miners, and they did not dare to controvert it. In all controversies, whenever the force of public opinion asserts itself, no man and no set of men, no corporation, no organization, or anything else can stand against it.

* * * * *

All of us who practice law know that the force of public opinion in many instances controls the judgment of the juries of the country. Whenever men differ upon the questions of employment or the standard of wages, and submit these differences to a board for settlement and discussion, those who decline to accept the judgment of that board, merely by the power of public opinion and persuasion, will be driven from their position, because the public will not stand for it, and that in the effort to resort to force is the evil of the amendment of the gentleman from Washington [Mr. Webster], which I hope will not be adopted. In addition there is no necessity for penalizing the railroad men of this Nation. There is not anywhere a more loyal and intelligent class, and they do not and will not deserve the proposed stigma.

Representative Cooper (Ohio), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, p. 8505):

This is the culmination of more than 50 years' efforts on the part of the carriers and their employees to perfect a plan that will absolutely guarantee to both parties a fair and equitable adjustment of any matter that can not be adjusted between the parties themselves, and creates the ideal condition for which the people of this country have looked for more than a quarter of a century; therefore the Anderson substitute should by all means prevail and become the law if it is the desire of Congress to place on the statute books a real workable plan.

The provisions of the substitute provide for practical, experienced men in each and every instance to hear and determine the questions of dispute as they arise, and if this substitute becomes effective it will do more to destroy the principles of the radicals of this country than any one thing that has been done, or perhaps everything that has been done so far, and it will be the final and fatal blow to radicalism and Bolshevism, in so far as the transportation industry is concerned, and will be accepted by the employees on the railroads as a constructive, fair, and reasonable solution of the adjustment of labor disputes.

Representative Hersey (Maine), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, pp. 9151, 9152):

Three plans have been offered to us. First, the plan of the committee bill, which provides a court of arbitration and attempts to enforce its decision by providing that the party that refuses to be bound shall be liable to a suit at law to recover damages, on the part of the labor union against the railroad and on the part of the railroad against the union, and to be collected from the treasury of the union.

The second is the plan of the gentleman from Washington [Mr. Webster], who agrees with the committee in the establishment of a court of arbitration, but provides in his amendment that if the union does not abide by the decision of the court of arbitration then the separate and individual property of each member of the union can be taken to satisfy the verdict.

The third plan is set forth in what is known as the amendment of the gentleman from Minnesota [Mr. Anderson], which provides a like court of arbitration, but leaves the enforcement of any decision to public opinion.

For my part I favor the Anderson amendment as the best solution of future labor disputes in railroad matters.

* * * * *

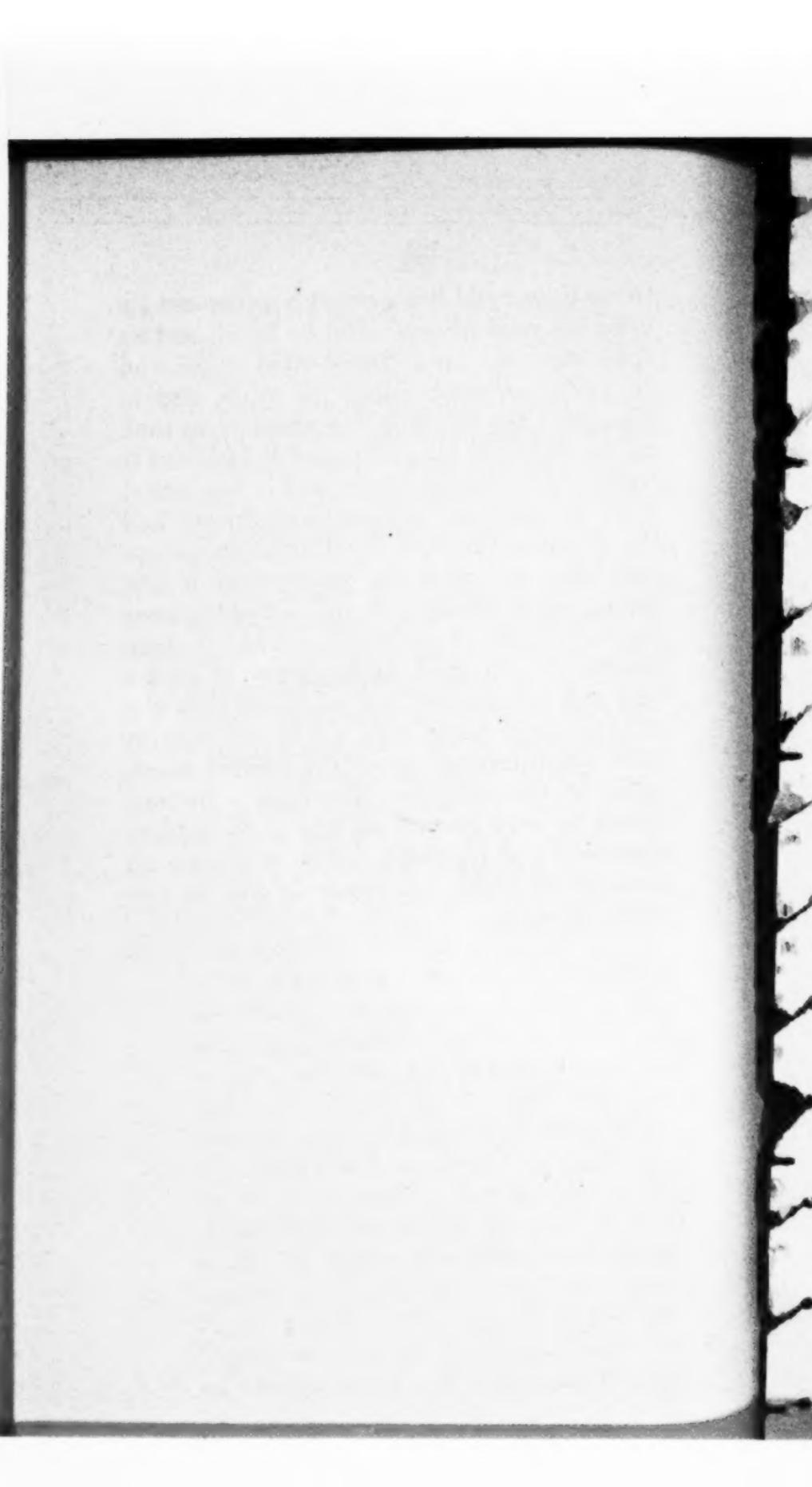
The boards of conciliation and arbitration that have been doing wonderful and efficient service for the past two years should be continued in the personnel of this new legislation. This board has settled over 3,000 labor disputes without a strike, and I am convinced that with the procedure provided by the Anderson amendment we shall never have another strike upon any railroad in this country or a threat of a strike.

Representative Black (Texas), November 14, 1919, said (Cong. Rec., vol. 58, pts. 1-9, p. 8511):

Mr. Chairman, a number of gentlemen in discussing this bill seem to speak as if its provisions would do away with the machinery of mediation and conciliation. I am sure that none of us want to do away with that machinery, and we hope that as many differences as possible will be settled in that way; but we all recall that in 1916 we had a board of mediation and conciliation and it tried for weeks to settle the disputes between the carriers and their employees, and when the board finally failed the President of the United States called the brotherhoods and the representatives of the carriers to Washington

to see if he could bring about a settlement by using his good offices. And he failed, and an order went out for a Nation-wide strike, and on Friday evening before the strike was to take place the House of Representatives took up the Adamson bill and passed it here, and it went speedily to the Senate, and it was passed there the next day without amendment, and the Supreme Court of the United States upheld that law upon the theory that it was compulsory arbitration on the part of Congress for the benefit of the public. Now, if those gentlemen who speak so eloquently of mediation and conciliation can assure us that the situation will never arise again like that of 1916 which brought about the hurried enactment of the Adamson law, then I for one would be very glad to see the whole subject dismissed and forgotten. But, of course, no man has it within his power to give us any such assurance.





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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1922.

—
No. 585
—

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,
vs.

UNITED STATES RAILROAD LABOR BOARD, R. M.
BARTON, G. W. W. HANGER, BEN W. HOOPER, A. O.
WHARTON, W. L. McMENIMEN, HORACE BAKER,
J. H. ELLIOTT, ALBERT PHILLIPS, SAMUEL HIG-
GINS,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS FOR
THE SEVENTH CIRCUIT.

—
FRANK J. LOESCH,
TIMOTHY J. SCOFIELD,
CHARLES F. LOESCH,
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4—The carrier announced it to be its intention and purpose to follow its own plan to decide upon the qualifications of the employees who were to vote, and avers that it has the right to prescribe and limit the qualifications of employees as to their voting by eliminating those not in actual service at the time, although they may be still on its rolls as employees, but simply laid off or furloughed at the time of election.	

- 5—The carrier states in its petition that it has been its policy to establish and maintain employee representation since the termination of federal control.
- 6—Section 6 of the petition contains a somewhat vague statement to the effect that the employees' representatives have recently signified their approval of the agreements negotiated with carrier.
- 7—The carrier states that the agreements it has entered into with employees of the shop crafts are in full force and effect, that the parties have acquired mutual rights thereunder, and that their abrogation by this board will work a great injury to both carrier and employees.
- 8—The carrier suggests that the employees who are not parties to the alleged contracts and who do not want to be bound by them may invoke the aid of the board.

As to the legal right of the carrier to establish rules and working conditions the board says.....

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"It is the duty of the board to prescribe what are fair, just and reasonable rules and working conditions for the parties without regard to their strict legal rights, and that if each party is allowed to insist upon its strict legal rights, as defined by the decisions of the Supreme Court of the United States prior to the enactment of the Transportation Act, it would be impossible for them to reach agreements, except the agreement to disagree and separate and thus, in effect, demoralize the transportation system of the country."

Order of the board on the petition to vacate Decision 218....

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"It is the order of the Labor Board that the carrier's request for an oral hearing of its petition shall be granted for the purpose of permitting the carrier to present its views on the following matters:

- 1—The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed, or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements on rules and working conditions.
- 2—The question of how the representative capacity of the spokesmen of unorganized employees shall be ascertained.

3—The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class.

Said hearing is set for 10 A. M., Monday, September 26, 1921.

The board declines to grant a hearing upon the other questions raised in carrier's petition, for reasons hereinbefore set out."

Plaintiff's Exhibit No. 1:

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IN THE
Supreme Court of the United States.

OCTOBER TERM, 1922.

No. 585.

THE PENNSYLVANIA RAILROAD COMPANY,
Appellant,
vs.

UNITED STATES RAILROAD LABOR BOARD, R. M.
BARTON, G. W. W. HANGER, BEN W. HOOPER,
A. O. WHARTON, W. L. McMENIMEN, HORACE
BAKER, J. H. ELLIOTT, ALBERT PHILLIPS,
SAMUEL HIGGINS,

Appellees.

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT.

I.

STATEMENT.

On December 9, 1921, the Pennsylvania Railroad Company filed its bill in the District Court of the United States to restrain the United States Railroad Labor Board, and the members thereof, from publishing it as a violator of Board decisions under Section 313 of the

Transportation Act of 1920. The hearing in the District Court was on bill, motions to dismiss and exhibits. The motions to dismiss were denied and a decree was entered perpetually enjoining defendants. Defendants appealed from said decree to the Circuit Court of Appeals for the Seventh Circuit, where the decree of the District Court was reversed and the cause was remanded with directions to dismiss the bill. From this order appellee there, appellant here, prayed and perfected an appeal to this court.

The Pennsylvania Railroad Company by its bill denied power in the Labor Board to dictate to it as to matters of railway procedure and management. It recognized a duty under Title III of the Transportation Act to meet representatives of its employees, both union and non-union, in conference. It denied power in the Board to compel it to confer with officers of labor unions and federated systems of labor unions, as such. It denied power in the Board to confer upon a federated system of labor unions the privilege of acting towards lawful objects through representatives of its own choice, whether such representatives are employees of the carrier or not, and to compel the carrier to agree thereto. It denied power in the Board to determine that a majority of any craft or class of employees shall have the right to select an organization to represent them in conference and impose such representation upon it. It contended that if a conference is agreed upon, its employees, both union and nonunion, are entitled to representation. It insisted that the Labor Board has no jurisdiction over the selection of representatives for conferences, or over principles to control such conferences. It insisted that the Labor Board is without power to declare elections held to select conferees illegal, and rules and

working conditions agreed upon by such conferees void. It insisted that the Board cannot function until the subject matter of dispute reaches it as provided in said act.

The Labor Board by its Decision No. 119 (Pr. Rec., 69-87), filed April 14, 1921, assumed to call upon the *officers and system organizations of employees of the carrier, parties to the decision*, to designate and authorize representatives to confer and decide so much of the dispute relating to rules and working conditions as it might be possible for them to decide and *prescribed 16 principles to which it required such conference to conform.*

Principle No. 5 declared the right of a lawful organization to act towards lawful objects through representatives of its own choice, *whether such representatives were employees of the carrier or not and declared that the carrier must agree to such principle.* (Pr. Rec., 84.)

Principle No. 15 declared that the majority of any craft or class of employees might designate *some organization* to represent the members of such craft or class. (Pr. Rec., 86.)

The Labor Board was without power, express or implied, to require conferences to be held between carrier and employee, but plaintiff, nevertheless, endeavored to conform to the request of the Labor Board in Decision 119. The Pennsylvania Railroad Company prepared and furnished each of its employees, both *union* and *nonunion*, ballots upon which to write the name of *union* and *nonunion employees* to represent them in conferences with the carrier to negotiate rules and working conditions. Against this ballot the officers of the various unions represented in its shop crafts protested, claiming that under the rules of the unions the general

chairmen of such unions were the authorized representatives of their members. The carrier refused to recognize them as such. Thereupon said union officers prepared and furnished the union membership in the employ of the Pennsylvania System a ballot for System Federation No. 90 to represent them in the proposed conference, directed them not to vote for individual representatives, and by circular ordered the members of such unions not to vote the ballot furnished by the carrier. Thus in effect two elections were held. The Pennsylvania Railroad Company recognized the election at which all its employees, union and nonunion, alike, were respectively provided with ballots and requested to vote for individual representatives, either union or nonunion, as they might elect. With the representatives so elected the carrier conferred. Together in conference they negotiated to a conclusion agreements covering rules and working conditions, and thereupon such agreements were reduced to writing and were thereafter conformed to by both union and nonunion employees.

Thereupon System Federation No. 90, by B. M. Jewell, president of the Railway Employees' Department of the American Federation of Labor made an *ex parte* submission to the Labor Board representing that in the election to select representatives the carrier had failed to conform to principles 5 and 15, attached to Decision 119, and inquiring whether or not a majority of the employees of any craft on the Pennsylvania System had the right to designate an organization to represent them in negotiating agreements with the carrier covering rules and working conditions, and whether or not a majority of the employees of such craft had the right to be represented in such negotiations by anyone other than an employee of said carrier, and whether or not the carrier had complied with the law in selecting representatives to repre-

sent its shop craft employees in negotiating rules and working conditions. The Board assumed jurisdiction of said *ex parte* submission and the carrier filed an answer.

By Decision No. 218 (Pr. Rec., 92-102) the Labor Board announced its holding on said *ex parte* submission. The decision declared that *under the authority of the Transportation Act* both elections on the Pennsylvania System were illegal. *That the rules negotiated thereunder were void and of no effect. The decision thereupon ordered a second election for representatives and prescribed the form of ballot to be used and dictated the qualification for voting.* (Pr. Rec., 98.) The carrier petitioned the Labor Board to vacate said decision but, after a hearing, the Labor Board refused to do so. (Pr. Rec., 106.)

The carrier contended that the Labor Board was without power to declare said election, and the contracts entered into between it and the representatives selected at said election, void, and that the Labor Board was without power to order carrier and employees to hold a second election as ordered in said Decision No. 218. Therefore the carrier declined to be a party to a second election as ordered by said decision, or to treat said contracts so entered into with its employees as void and of no effect. Thereupon, under Section 313 of Title III of said act, the Labor Board determined that the carrier had violated its Decision No. 218, and ordered publication of The Pennsylvania Railroad Company for refusing to follow said decision. The carrier then filed its bill in the United States District Court praying that the Labor Board and its members, among other things, be enjoined from making such publication. The defendants moved to dismiss said bill and filed a so-called answer concerning which Judge Page said in his opinion

(Pr. Rec., 135) that the so-called answer filed by the defendants was nothing more than a statement of grounds urged for dismissal, with the orders of the Labor Board and its decisions referred to in the bill, attached as exhibits.

The power assumed by the Labor Board is shown in its decisions, filed as exhibits, authority for which, if there be such authority, must arise under the provisions of said Title III of the Transportation Act of 1920.

The hearing was upon bill, motions to dismiss, and exhibits. The motions to dismiss were overruled.

A construction of Sections 301, 307, 308 and 313 of Title III of the Transportation Act of 1920 was essential to a decision both on the question of power and on the constitutionality of the act.

Judge Page construed said sections and held that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties, that the appointment or method of election of conferees under Section 301 was not one of the functions delegated to the Labor Board (Pr. Rec., 139), and that the Labor Board was without power or authority to make the regulations provided for in its Decision No. 218 on pages 8, 9 and 10. (Pr. Rec., 98-102.)

A perpetual injunction was entered restraining the Labor Board and its members:

“(1) From assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act unless and until there has been a joint submission of a dispute by the carrier and the employees which has been the subject matter of conference between them.

(2) Upon such joint submission the Board may proceed to hear and determine disputes only under

and in accordance with the general provisions of Title III of the Transportation Act.

(3) From making publication of any matter based upon action taken by the Board not in harmony with Item 1 hereof." (Pr. Rec., 146-7.)

From the decree entered in the District Court the defendants perfected an appeal to the United States Circuit Court of Appeals for the Seventh Circuit sitting at Chicago, Illinois. Thirteen errors were assigned on which the appeal was there heard. (Pr. Rec., 149-152.)

Under the opinion in the Circuit Court of Appeals (Pr. Rec., 167-179) the 4th, 5th and 6th assignments seem to have been sustained.

The 4th assignment alleges that the District Court should have held that it was without jurisdiction, power, or authority to control, by writ of injunction or otherwise, the administration, discretion and action of the United States Railroad Labor Board and the members thereof in the discharge of their functions under Title III of the Transportation Act of 1920.

The 5th assignment alleges that the District Court erred in substituting its judgment and discretion for the judgment and discretion of the United States Railroad Labor Board and the members thereof in a matter resting for its determination exclusively within the jurisdiction of the United States Railroad Labor Board and the members thereof.

The 6th assignment alleges that the District Court erred in holding and adjudging that it had jurisdiction, power and authority to control by writ of injunction or otherwise the administration, discretion and action of the United States Railroad Labor Board and the members thereof after holding that Title III of the Transportation Act of 1920 was constitutional and valid in its entirety.

Assignment 4 assumes that in ordering the carrier to meet in conference labor unions and system federations of labor unions as the representatives of its employees rather than individual representatives selected from among its own employees, union and nonunion alike, the Labor Board was acting within its discretion and discharging a function conferred upon it by Title III of the Transportation Act.

Assignment 5 assumes that it was within the discretion of the Labor Board and exclusively within its power to determine under Title III that carriers should confer with labor unions and heads of system federations of labor unions, as such, as representatives of its employees rather than with individual representatives selected by its employees, both union and nonunion, and that the District Court substituted the court's judgment and discretion for the judgment and discretion of the Labor Board.

Assignment 6 assumes that the subject matter of dispute was within the discretion of the United States Railroad Labor Board and that the District Court was without power to control said discretion by writ of injunction or otherwise.

Upon these three assignments the decision of the Circuit Court of Appeals must stand or fall.

The allegations of the bill not having been denied the material averments thereof, with all their intendments, must be taken as true for the purpose of the motions to dismiss.

In the District Court upon a construction of pertinent sections it was held *that the appointment or method of election of conferees was not a function delegated to the Labor Board.*

In the United States Circuit Court of Appeals with-

out construing pertinent sections it was held that *whether or not* the appointment or method of election of conferees was one of the *functions delegated to the Labor Board* was a matter in the *discretion* of the Labor Board and its discretion was not subject to review.

The Circuit Court of Appeals declared that "whether the employees may if they choose be represented by an organization as held by the Board or whether they may be represented only by individuals who were employees of the same employer as contended by appellee is not properly a question for a court * * *. But in so far as it was for the Board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question and the manner of its disposition was for the Board, no question here arising as to the Board's good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee it is not for the court to substitute its opinion for that of the Board in matters of law committed to the Board." (Pr. Rec., 177-178.)

The decree of the District Court was reversed, and the cause remanded to that court, with directions to dismiss the bill.

If Title III does not make the appointment, or method of election of conferees under Section 301 a function of the Labor Board, as declared in the District Court, *and not disputed in the Circuit Court of Appeals*, the Labor Board is not endowed with a discretion to function in the election of conferees.

The Circuit Court of Appeals upholds Labor Board Decision 218 under a supposed discretion—not under an express power conferred by the act—and declines to

consider the pertinent constitutional questions raised by the carrier.

Appellant denies that Title III of the Transportation Act of 1920 empowers the Labor Board, *expressly or under a discretion*

(a) To compel carriers to confer with officers of labor unions and system federations of labor unions, as such, in *negotiating rules and working conditions* with their employees.

(b) To compel carriers to agree that a labor organization may act through representatives of its own choice in negotiating rules and working conditions with carriers *whether such representatives are employees of the carrier or not.*

(c) To declare that the majority of any craft may select an *organization* to represent its members in negotiating rules and working conditions and that the *carrier shall agree thereto and confer with the designated organization.*

(d) To declare elections held to select conferees under Section 301 of said title void.

(e) To *invalidate contracts* covering rules and working conditions which are being conformed to by all the carrier's employees, union and nonunion alike.

Appellant contends that if Decision 218 is not authorized by said title the Labor Board is without *power or discretion* to publish The Pennsylvania Railroad Company for refusing to conform thereto to the irreparable injury of its property, which the bill alleges will inevitably follow such publication.

Appellant further contends that if said act authorizes the Board as above it violates the due process clause of the Constitution of the United States and is void.

II.

SPECIFICATION OF ERRORS RELIED UPON.

The Circuit Court of Appeals erred:

1. In holding and deciding that the relief prayed for in the bill should have been denied and in reversing the decree of the District Court and directing that the bill be dismissed.
2. In deciding and holding that the constitutionality of Title III of the Transportation Act of 1920 is not here involved, and in refusing to pass upon the constitutional questions raised by the bill and involved herein.
3. In refusing to pass upon the constitutionality of Title III, and each section thereof, under which title the Labor Board asserts a right and has assumed power to declare contracts and agreements entered into between The Pennsylvania Railroad Company and its employees void, and power to direct that a second election be held to select conferees for conferences to agree upon contracts and agreements in lieu of those so as aforesaid declared void in violation of the Constitution of the United States and in violation of the 5th, 6th and 7th Amendments to said Constitution.
4. In holding and deciding that "there is not here involved any proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions" * * * "and when this stage is reached and one or both of the parties refuse to obey the Board's decision it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties," thereby holding that the question of the constitutionality of Title III cannot be interposed except-

ing as to decisions of the Board which concern wages and working conditions.

5. In deciding and holding that the protection of the Constitution, if applicable, cannot attach herein to protect the carrier from an irreparable injury to its property, through the publication of appellant, which decision said Board was without authority to make.

6. In not holding, deciding and adjudging that the Labor Board is without power to intervene in any way in the proceedings contemplated by said Section 301 preceding a submission to it jointly by the parties.

7. In not holding, deciding and adjudging that the dispute here involved arises wholly under the provisions of Section 301 of the Transportation Act of 1920.

8. In deciding and holding that the Labor Board did not transcend its power and functions under Title III in Decisions 119 and 218 as to the selection of conferees for conference, as to eligibility to election as conferees, as to how conferees may be selected and as to whether officers of labor unions, as such, may represent employees in such conferences instead of individual employees elected as representatives by the employees of the carrier, both union and nonunion.

9. In not holding, deciding and adjudging that the United States Railroad Labor Board was without power to promulgate and prescribe principles 5 and 15, or either of them, attached to and made a part of Decision 119.

10. In deciding and holding that whether employees may be represented in conferences contemplated by Section 301 by an organization, or by individuals, who are employees of the same employer, is wholly within

the discretion of the Board and that an exercise of such discretion cannot be reviewed by the courts.

11. In deciding and holding that the Labor Board acquired jurisdiction to decide the *ex parte* submissions which gave rise to Decision 218 and in holding that the decision thereon was in the discretion of the Labor Board and not subject to review in the courts.

12. In not holding, deciding and adjudging that the appointment, method of electing, or eligibility for conferees, under Section 301, are not functions delegated to the United States Railroad Labor Board and that the Board was without power to make the regulations it assumed to make and set out in its Decision No. 218, on pages 8, 9 and 10, deciding who are eligible to vote for conferees, requiring conferences to be held and prescribing the contents of ballots to be used.

13. In not holding, deciding and adjudging that the selection of conferees for conferences, between a carrier and its employees, under Section 301, is for the determination of the interested carrier and employees alone, unless they cannot agree and thereupon jointly submit such dispute to the Board for decision and determination under the provisions of said Section 301.

14. In not holding, deciding and adjudging that the United States Railroad Labor Board was without jurisdiction to determine, as it assumed to be in Decision 218, that the election for employee conferees for conferences as to rules and working conditions on the Pennsylvania System was illegal, and that the rules and working agreements negotiated by representatives so elected are void and of no effect, and to order another election held, on the *ex parte* submission by the Railway Employees Department of the American Federation of Labor of the

questions which gave rise to said Decision 218, which questions are set out in said decision and are as follows:

"(1) Has a majority of the employees of any craft on the Pennsylvania System the right to designate an organization to represent said employees in negotiating an agreement with the carrier covering rules and working conditions?

(2) Has a majority of the employees of such craft the right to be represented in such negotiations by anyone other than an employee of said carrier?

(3) Has the carrier complied with the law in the method pursued by it to ascertain who are the representatives of the shop employees with whom it shall negotiate rules?"

15. In not deciding, holding and adjudging that the United States Railroad Labor Board and the members thereof are without power to determine whether the selection of conferees under Decision 119 complied with the law.

16. In holding and deciding that jurisdiction over the subject of rules and working conditions was conferred upon the Board by the transition from federal to company control and that the jurisdiction so conferred, authorized it to hear and determine a dispute between the carrier and its employees subsequently arising under Section 301, without joint submission of the dispute by the respective parties thereto to the Labor Board for its decision and determination.

17. The court erred in holding and deciding that the transition from federal to company control under the Transportation Act of 1920 conferred jurisdiction over pending disputes as to wages and working conditions upon the Board without regard to the provisions of Sections 301 and 307 thereof in declaring that if * * * "the dispute here involved is one which might in any event be cognizable by the Labor Board under Title III it is

not material whether it comes to it under Section 301, or under any other or all sections of the title."

18. The court erred in deciding and holding that if the dispute here involved is one which might in any event be cognizable by the Labor Board under Title III it is not material whether it comes to it under Section 301, or under any other, or all the sections of the title, inasmuch as under Title III the question of conferees for conferences as to disputes between carriers and employees cannot come to the Labor Board for determination under any other section than Section 301, and then only in accordance with the plain language of the section which requires joint submission. Unless the Labor Board so acquires jurisdiction it does not have jurisdiction.

19. In not holding, deciding and adjudging that the United States Railroad Labor Board is without authority to make publication of the carrier under Section 313 of the Transportation Act, for refusing to comply with the Board's Decision No. 218.

The foregoing assignments of error, respectively, go to the question of power in the United States Railroad Labor Board under the provisions of Title III of the Transportation Act of 1920 to render Decision No. 119 (Pr. Rec., 74-75), and to promulgate principles 5 and 15 attached thereto (Pr. Rec., 84-86), to render Decision No. 218 (Pr. Rec., 98), declaring elections void, invalidating contracts, ordering new elections held and prescribing the form of ballot and rules under which the eligibility of employees to vote must be determined, as it did therein (Pr. Rec., 98-102), and the power of the Labor Board to order publication of appellant for refusing to conform to the provisions of said Decisions 119 and

218. The argument to sustain each of said errors is, therefore, directed to the question of the power of the Labor Board under Title III of the Transportation Act of 1920.

The question thus presented can be determined only by a construction of pertinent sections of Title III of the Transportation Act.

The foregoing assignments of error also raise the question of the constitutionality of the act if it should be determined that its language authorizes the said decisions and orders of the Board.

BRIEF OF ARGUMENT.

I.

CONSTRUCTION OF SECTION 301 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

II.

CONSTRUCTION OF SECTION 307 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

III.

CONSTRUCTION OF SECTION 308 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

IV.

CONSTRUCTION OF SECTION 313 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

V.

THE FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR ON APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT OF APPEALS.

VI.

A SUIT PENDING IN A FEDERAL COURT AGAINST FEDERAL OFFICERS TO ENJOIN THEM FROM TAKING ACTION IN THE NAME OF AND FOR THE GOVERNMENT, UNDER COLOR OF THEIR OFFICES, TO ENFORCE AN UNCONSTITUTIONAL STATUTE IS MAINTAINABLE AND IS NOT A SUIT AGAINST THE GOVERNMENT.

Ex Parte Young, 209 U. S. 123; 52 L. Ed. 714.

Greene, Auditor et al. v. Louisville & I. R. Co.
244 U. S. 499; 61 L. Ed. 1280.

Bonnett v. Vallier, 136 Wis. 193; 17 L. R. A. (N. S.), 486.

VII.

A SUIT TO ENJOIN OFFICERS AND BOARDS FROM EXERCISING AN EXCESS POWER, NOT AUTHORIZED BY A STATUTE, IS MAINTAINABLE EVEN THOUGH THE STATUTE BE CONSTITUTIONAL.

Reagan v. Farmers Loan & Trust Company, 154 U. S. 362; 38 L. Ed. 1014.

Prentis v. Atlantic Coast Line Railroad Company, 211 U. S. 210; 53 L. Ed. 150.

Louisville & Nashville Railroad Co. v. R. Hudson Burr et al. Railroad Commissioners, 63 Fla. 491.

Louisville & Nashville R. Co. v. Bosworth et al.
209 Fed. 380 (District Court, E. D. Ky., Frankfort Division, 1913).

Robert L. Greene (successor of Henry M. Bosworth), Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation

and Assessment for the State of Kentucky et al. Appts. v. Louisville & Interurban Railroad Company, 244 U. S. 499; 61 L. Ed. 1280 (No. 617).

25 Ruling Case Law, 414, Section 51.

VIII.

THE SUBMISSION WHICH GAVE RISE TO DECISION 218 DID NOT INVOLVE ANY DISPUTE AS TO RULES AND WORKING CONDITIONS.

IX.

THE BOARD IS NOT ENDOWED WITH ANY DISCRETION EXCEPT AS TO SUCH FUNCTIONS AS ARE IMPOSED UPON IT BY LAW. THE SELECTION OF CONFEREES FOR CONFERENCES IS NOT SUCH A FUNCTION.

X.

TITLE III NEITHER DIRECTLY, NOR INDIRECTLY, IMPOSES LABOR UNIONS, AS SUCH, OR INDIVIDUALS NOT IN ITS EMPLOY, UPON THE CARRIER, AS CONFEREES IN CONFERENCES CONTEMPLATED BY THE ACT.

XI.

IF THE LABOR BOARD INHERITED JURISDICTION OVER DISPUTES CONCERNING RULES AND WORKING CONDITIONS IT WAS OUSTED OF JURISDICTION WHEN THE PENNSYLVANIA RAILROAD COMPANY AND ITS EMPLOYEES SETTLED SUCH DISPUTES.

XII.

THE BILL ALLEGES, AND THE MOTIONS TO DISMISS ADMIT, THAT THE LABOR BOARD DETERMINED THAT THE PENNSYLVANIA RAILROAD COMPANY HAD REFUSED TO CONFORM TO ITS DECISION 218 AND THEREUPON ORDERED PUBLICATION AGAINST SAID COMPANY UNDER SECTION 313. THE ADMISSION PRECLUDES THE SUGGESTION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS THAT THE MOTION TO VACATE DECISION 218 IS STILL PENDING BEFORE THE BOARD.

XIII.

THE CONSTITUTIONAL QUESTION RAISED BY THE PLEADINGS IS PERTINENT AND WELL TAKEN. THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE SAME.

Wilson v. New, 243 U. S. 332; 61 L. Ed. 755.

Wilson v. New, 243 U. S. 373; 61 L. Ed. 784
(dissenting opinion by Justice Pitney).

Wilson v. New, 243 U. S. 364; 61 L. Ed. 780
(dissenting opinion by Justice Day).

Adair v. United States, 208 U. S. 161; 52 L. Ed. 436.

Ft. Smith & Western Railroad Company et al. v. Mills, Receiver, etc., 253 U. S. 206; 64 L. Ed. 862.

ARGUMENT.

I.

CONSTRUCTION OF SECTION 301 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

The decree in the District Court perpetually enjoined the United States Railroad Labor Board and its members from assuming any authority or taking any action of any kind or character under Section 301 of the Transportation Act unless and until there has been a joint submission of the dispute by the carrier and employees which has been the subject matter of conference between them and from making publication of any matter based upon any action taken by the Board which did not result from such joint submission. (Pr. Rec., 146-147.)

The decree required the Labor Board to function in accordance with the act. It restrained the Labor Board from exercising power which the act did not confer. It took from the Labor Board no power. The construction of Section 301, and the power of the Board thereunder, as declared by Judge Page, was in exact accord with the language of the section.

Section 301 of Title III is as follows:

"It shall be the duty of all carriers and their officers, employees, and agents to exert every reasonable effort and adopt every available means to avoid any interruption to the operation of any carrier growing out of any dispute between the carrier and the employees or subordinate officials thereof. All such disputes shall be considered and, if possible, decided in conference between representatives designated and authorized so to confer by the carriers,

or the employees or subordinate officials thereof, directly interested in the dispute. If any dispute is not decided in such conference, it shall be referred by the parties thereto to the Board, which under the provisions of this title is authorized to hear and decide such dispute."

Under this section the duty devolves upon carriers, officers, employees and agents to do everything that can reasonably be done to *avoid interruption in the operation of the carrier* growing out of disputes contemplated by the section between the carrier and its employees or subordinate officials. To that end the section requires the representatives designated by the carriers, employees or subordinate officials, *directly interested in the dispute*, to confer in an effort to settle any such dispute. The section imposes no power or duty upon the Board in connection with the effort of the carriers, officers, employees and agents to avoid interruption in operation, or in the selection of conferees. The section confers no power upon the Board to dictate procedure under which such representatives, or conferees, shall be selected. The section confers no power upon the Board to prescribe an election or the qualifications for voting if an election is held. The selection of conferees is neither directly nor indirectly within the control of the Board. The section provides that if the conferees fail to settle the dispute "*the parties thereto*" shall refer such dispute to the Board and thereupon "*under the provisions of this title*" the Labor Board is "*authorized to hear and decide said dispute*." The representatives of the carrier and its employees and subordinate officials, or the conferees representing them, are "*the parties thereto*." The conferees *having failed to agree and having jointly submitted the dispute to the Labor Board*, the section authorizes the Labor Board to function and to hear and decide the dispute. The power of

the Labor Board is *limited* to hearing and deciding the dispute so submitted. It is without power to go behind the joint submission and inquire into the procedure under which conferees were selected, or into the qualifications of electors in the selection of conferees. The parties having made a joint submission the dispute is before the Board for hearing and decision. Having heard and decided it, the Board has performed its function as a Board of Arbitration under Section 301.

Said section does not confer power upon the Board to prescribe *rules* to govern the carrier and its employees, or its subordinate officials, in *selecting representatives for conference*, nor does it confer power upon the Board to prescribe principles to govern and control the carrier, and its employees, and its subordinate officials in *selecting representatives for such conference*.

Section 301, therefore, *provides for voluntary arbitration only* and does not confer power upon the Labor Board to *assume jurisdiction* over a dispute between the carrier, its officers, employees and agents upon an *ex parte submission*.

II.

CONSTRUCTION OF SECTION 307 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

Section 307 of said act provides that where an appropriate adjustment board has not been organized under the provisions of Section 302 (and no such board has been organized here), the Labor Board may, upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, or upon a petition signed by not less than 100 unorganized em-

ployees, or subordinate officials, directly interested in the dispute, or upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, receive for hearing and as soon as practicable and with due diligence decide disputes involving grievances, rules, or working conditions, or wages, or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301 of said act—that is, by a conference or by a voluntary submission to arbitration.

Section 307, paragraph (a), of Title III of the Transportation Act, concerns rules and working conditions, and is as follows:

“(a) The Labor Board shall hear, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions, in respect to which any adjustment board certifies to the Labor Board that in its opinion the adjustment board has failed or will fail to reach a decision within a reasonable time, or in respect to which the Labor Board determines that any adjustment board has so failed, or is not using due diligence in its consideration thereof. In case the appropriate adjustment board is not organized under the provisions of Section 302, the Labor Board, (1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or working conditions which is not decided as provided in Section 301 and which such adjustment board would be required to receive for hearing and decision under the provisions of Section 303.”

Here the act confers power upon the Board on its own motion, or on *ex parte submissions*, to receive and decide disputes involving grievances, rules or working conditions—and under paragraph (b) thereof—wages or salaries of employees or subordinate officials of carriers, not decided as provided in Section 301, if such disputes are likely to substantially interrupt commerce.

Thus submissions under this *section* may be *ex parte* or on the *Board's own motion*.

An *ex parte* submission may be made by the chief executive of any carrier, or organization of employees, or subordinate officials, whose members are directly interested in the dispute.

This section provides a way for *one party* to take a dispute, within its purview, to the Labor Board without regard to the other party. Section 301 does not provide for an *ex parte submission* of any dispute to the Labor Board. The difference between Sections 301 and 307 in this respect is conclusive that Section 301 contemplates voluntary arbitration and Section 307 compulsory arbitration.

The only disputes which said Board may acquire jurisdiction to consider under the provisions of said Section 307 are such as concern rules, working conditions, and grievances growing out of the administration of such rules and such working conditions, and wages. Neither said section nor any other confers power upon or authorizes said Board to prescribe rules to govern the carrier and its employees in selecting representatives to confer in an effort to avoid any interruption to the operation of the carrier growing out of disputes between the carrier and its employees or subordinate officials thereof, or to prescribe principles to govern and control said carrier and its employees in selecting representatives to

such conference. Matters of procedure preceding and leading up to and culminating in the conference contemplated by Section 301 are not within the jurisdiction of the Labor Board or within its power to control.

III.

CONSTRUCTION OF SECTION 308 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

In an opinion filed on September 16, 1921, Docket No. 404, on the application of the Pennsylvania Railroad Company to vacate Decision No. 218, the Labor Board said, the italics being ours (Pr. Rec., 116):

“2. The right of the Board to adopt the principles set out in Decision 119 and in other decisions, for the guidance of carriers and employees, is questioned.

It is a settled principle of law that under a remedial act, as this is, even where not expressly given, sufficient powers are implied to enable the purposes of the act to be accomplished. But in *this instance the power is expressly given in the language of the statute*, namely, ‘The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title.’ ”

It would seem from the foregoing quotation from the act that the Board finds authority to impose said sixteen principles on carrier and employee therein, and not under an implied power. The quotation is from Section 308. That section relates to and concerns the election of a chairman, places for board meetings, duty to study relations between carriers and employees, to make regulations necessary for the efficient execution of its functions and for the publication of its decisions. The section deals exclusively with procedure and authorizes the Board to make regulations necessary to

enable it to function—not to enable carriers, or employees, or labor unions, to function, but to enable the Labor Board to function under the act. The language of the quotation does not delegate power to the Board to legislate, or authorize it to read into the act powers which are not there. *The Labor Board does not find justification for the promulgation of said principles in Sections 301 or 307, or any construction thereof, but upon the quotation from Section 308 as express authority.* It necessarily follows that principles 5 and 15 promulgated by the Labor Board are not within the act. The language quoted does not authorize the Board to promulgate said principles and impose them upon carriers under threat of holding protesting carriers up to the world as outlaws.

Such a defense of these 16 principles by the Labor Board is an admission that they are not within the act and that unless Section 308, which concerns Board procedure only, authorizes them their promulgation cannot be justified.

IV.

CONSTRUCTION OF SECTION 313 OF TITLE III OF THE TRANSPORTATION ACT OF 1920.

Section 313 of said act authorizes the Board, when it has reason to believe that any decision of the Labor Board has been violated by carrier, or employees, or subordinate official, or organization thereof, upon its own motion, after due notice and hearing to all persons directly interested, to determine whether or not such violation has occurred, and if it has, to publish its decision in such manner as it may determine. The section seems to authorize such determination and publication for a

violation of *any* decision. While the language covers *all* decisions it cannot extend to and authorize publication for a refusal to conform to a decision which the Labor Board is without jurisdiction to make. An unauthorized decision is not within the section.

It is insisted by appellant that the Board was without power to declare the said election illegal and the said contracts entered into with its employees under said election void, and was without power to order and direct a second election as it did in Decision No. 218. The carrier, having conducted an election in strict accord with the spirit and the letter of Section 301, at which all employees in its shop crafts, both union and non-union, were invited to participate in selecting persons to represent them, and representatives so selected having subsequently met the representatives of the carrier and having entered into contracts with the carrier, declined to take part in a second election and denied power in the Board to declare said election illegal and said contracts so entered into void.

If Title III of the Transportation Act of 1920 assumes to confer power upon the Labor Board to compel carrier and employee to obey every decision which the Labor Board assumes to make under the coercive influence of a threat of publication, whether or not the subject matter thereof is within the jurisdiction of the Board, the part of said Title III conferring such power is unconstitutional.

V.

THE FOURTH, FIFTH AND SIXTH ASSIGNMENTS OF ERROR ON
APPEAL FROM THE DISTRICT COURT TO THE CIRCUIT COURT
OF APPEALS.

The fourth error assigned was that the court should have adjudged that the United States District Court was without power or authority to control by writ of injunction or otherwise the *administration, discretion and action* of the United States Railroad Labor Board and the members thereof *in the discharge* of their functions under Title III of the Transportation Act. (Pr. Rec., 150.)

The fifth error assigned was that the court erred in *substituting the judgment and discretion of the court for the judgment and discretion of the United States Railroad Labor Board and the members thereof* in a matter which rested for its determination *exclusively within the jurisdiction of the Labor Board.* (Pr. Rec., 150.)

The sixth error assigned was that the court erred in holding and adjudging that the United States District Court had jurisdiction, power and authority to control by writ of injunction or otherwise the *administration, discretion and action of the United States Railroad Labor Board and the members thereof* after holding that Title III of the Transportation Act was constitutional and valid in its entirety and that the decisions of the United States Railroad Labor Board and the members thereof were only advisory. (Pr. Rec., 150.)

The District Court *did not hold* that it had *jurisdiction, power or authority to control by writ of injunction or otherwise the administration and discretion of the Labor Board and its members in the performance of functions*

conferred on that body by Title III of the Transportation Act, nor did the District Court substitute the judgment and discretion of the court for the judgment and discretion of the United States Railroad Labor Board and its members as to any matter which was entrusted to the administration and discretion of the United States Railroad Labor Board by said act.

The District Court held that the appointment or method of election of conferees under Section 301 was *not one of the functions delegated to the board* and therefore the Board was without power to prescribe and require the observance of the regulations set out in Decision 218 on pages 8, 9 and 10. (Pr. Rec., 139.) If the appointment or method of electing conferees under Section 301 is not a function delegated to the Board, the Board was without power or authority in the premises and the District Court in enjoining the Board and its members from exercising such power did not enjoin the *administration or discretion* of any function conferred on the Board by the act.

In view of the scope of the injunctional order, it is immaterial whether the Labor Board is or is not a corporation with capacity to sue and be sued. In the District Court Judge Page said (the italics being ours) (Pr. Rec., 136) :

"In my opinion the Labor Board is a body corporate subject to the jurisdiction of the federal courts and may sue and be sued. This does not mean, however, that the *courts* have any general authority over the exercise of a *discretion vested in an administrative body or officer.*"

The court here disavows power to control the *administration and discretion* vested in the United States Railroad Labor Board when such *administration* and

discretion is a function conferred upon the Board by the act, but holds that the power to take jurisdiction of and to supervise any matter which precedes a joint submission to the Board under Section 301 *is not a function* conferred upon the Railroad Labor Board and *may be enjoined*.

To read Section 301 is to agree with the construction given to it by Judge Page. Its language cannot be warped to mean anything else. The fact that the effort of the Board to direct and control concerned matter which precedes the power of the Board to function is conclusive as to the question of "administration and discretion" and disposes of errors 4, 5 and 6 as assigned.

VI.

A SUIT PENDING IN A FEDERAL COURT AGAINST FEDERAL OFFICERS TO ENJOIN THEM FROM TAKING ACTION IN THE NAME OF AND FOR THE GOVERNMENT, UNDER COLOR OF THEIR OFFICES, TO ENFORCE AN UNCONSTITUTIONAL STATUTE IS MAINTAINABLE AND IS NOT A SUIT AGAINST THE GOVERNMENT.

It was contended both in the District Court and in the Circuit Court of Appeals that this is a suit against the Government of the United States without governmental consent and cannot be maintained. It was further contended that the bill seeks to enjoin the Railroad Labor Board from the exercise of discretion and judgment conferred upon it by the act in the administration of its functions. If we understand the opinion of the Circuit Court of Appeals the decree of the District Court was not reversed and remanded because the suit was against the Government and consent to sue

had not been obtained. Nevertheless that contention is preserved in the record by assignment of error No. 3 on the appeal to the Circuit Court of Appeals. (Pr. Rec., 150.) If Title III does not confer discretion upon the Labor Board to promulgate principles 5 and 15, or to declare elections illegal, or to hold contracts and agreements entered into void, suit to enjoin would not be against the government and would be maintainable, without the consent of the government. If the act authorizes the Board to promulgate said principles, or to declare elections illegal, or to hold contracts and agreements entered into void, the act is unconstitutional and suit would be maintainable to restrain the enforcement of the unconstitutional act to the irreparable injury to the property of the carrier without governmental consent.

In *Ex Parte Young*, 209 U. S. 123, the court held that it had jurisdiction to determine the constitutionality of the various statutes involved which state officers or boards were about to enforce, and to enjoin the enforcement of such statutes as it found to be unconstitutional.

Robert L. Greene (successor of Henry M. Bosworth), auditor, Sherman Goodpaster, treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation and Assessment for the State of Kentucky et al., appts. v. Louisville & Interurban Railroad Company, 244 U. S. 499, 61 L. Ed. 1280 (No. 617), reviews *Louisville & Nashville R. R. Co. v. Bosworth et al.* 209 Fed. 380.

The following is quoted from the opinion:

“(2) A fundamental contention of appellants is that the present actions, brought to restrain them in respect of the performance of duties they are exercising under the authority of the State of Ken-

tucky, are in effect suits against the state. Questions of this sort have arisen many times in this court, but the matter was set at rest in *Ex Parte Young*, 209 U. S. 123, 150, 155, 52 L. Ed. 714, 725, 727, 13 L. R. A. (N. S.) 932, 28 Sup. Ct. Rep. 441, 14 Ann. Cas. 764, where it was held that a suit to restrain a state officer from executing an unconstitutional statute in violation of plaintiff's rights and to his irreparable damage, is not a suit against the state, and that 'individuals who, as officers of the state, are clothed with some duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature, to enforce against parties affected an unconstitutional act, violating the Federal Constitution, may be enjoined by a federal court of equity from such action.'

In repeated decisions since *Ex Parte Young*, that case has been recognized as setting these questions at rest. *Western U. Teleg. Co. v. Andrews*, 216 U. S. 165, 166, 54 L. Ed. 430, 431, 30 Sup. Ct. Rep. 286; *Herndon v. Chicago, R. I. & P. R. Co.* 218 U. S. 135, 155, 54 L. Ed. 970, 976, 30 Sup. Ct. Rep. 633; *Philadelphia Co. v. Stimson*, 223 U. S. 605, 621, 56 L. Ed. 570, 577, 32 Sup. Ct. Rep. 340; *Home Teleph. & Teleg. Co. v. Los Angeles*, 227 U. S. 278, 293, 57 L. Ed. 510, 517, 33 Sup. Ct. Rep. 312; *Truax v. Raich*, 239 U. S. 33, 37, 60 L. Ed. 131, 133, L. R. A. 1916D, 545, 36 Sup. Ct. Rep. 7. And see *Hopkins v. Clemson Agri. College*, 221 U. S. 636, 642-644, 55 L. Ed. 890, 894, 895, 35 L. R. A. (N. S.), 243, 31 Sup. Ct. Rep. 654."

Bonnett v. Vallier, 136 Wis. 193, 17 L. R. A. (N. S.) 486, was an action by a property owner to restrain certain public officers from enforcing certain statutory provisions relating to buildings. In the court below a demurrer was filed to the complaint, which was overruled and an injunction was issued as prayed for. The court affirmed the judgment below. It was alleged that the act sought to be enforced was unconstitutional. The Supreme Court held:

1. That a person specially injuriously affected by enforcement of an unconstitutional law may in judicial proceedings challenge the validity thereof.
2. That an action against state officials to enjoin them from enforcing an unconstitutional legislative enactment is not an action against the state. In such circumstances the law, so called, affords such state officers no protection. They are judicially regarded as acting in their personal capacities only.
3. That an unconstitutional legislative enactment, though in law form, is in fact not law at all. It confers no rights, it imposes no duties, it affords no protection and is in legal contemplation as inoperative as though it had never been passed.
4. That a court, upon its jurisdiction being properly invoked for that purpose, is in duty bound to test a legislative enactment by all constitutional limitations bearing thereon and condemn it if it be found illegitimate and thus uphold the Constitution as superior to legislative will.

The court held the law to be unconstitutional.

VII.

A SUIT TO ENJOIN OFFICERS AND BOARDS FROM EXERCISING AN EXCESS POWER, NOT AUTHORIZED BY A STATUTE, IS MAINTAINABLE EVEN THOUGH THE STATUTE BE CONSTITUTIONAL.

In *Reagan v. Farmers Loan & Trust Company*, 154 U. S. 362, 38 L. Ed. 1014, the threatened action sought to be enjoined was not action to enforce, or in pursuance of an unconstitutional statute, but action to enforce transportation rates fixed by the Texas Railroad Com-

mission under a constitutional statute empowering it to fix such rates, on the ground that the rates so fixed were confiscatory, and hence that the act of the Railroad Commission—not the statute—was unconstitutional. The suit was held to be maintainable.

The suit was one to restrain the enforcement by state officers of unjust and unreasonable rates fixed for carriers by state authorities and the court held that such a suit was not against the state and was not within the prohibition of the Eleventh Amendment, the state being interested only in a governmental and not in a pecuniary sense. The court said, among other things:

“Neither will the constitutionality of the statute, if that be conceded, avail to oust the federal court of jurisdiction. A valid law may be wrongfully administered by officers of the state, and so as to make such administration an illegal burden and exaction upon the individual. A tax law as it leaves the legislative hands may not be obnoxious to any challenge and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred and when they do so the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts.”

To the same effect is the case of *Prentis v. Atlantic Coast Line Railroad Company*, 211 U. S. 210, 53 L. Ed. 150. The court held that when a railroad commission has fixed a rate, a bill against the commission to restrain the members from enforcing it will not be bad as an attempt to enjoin legislation or as a suit against a state and will be the proper form of remedy.

In *Louisville & Nashville Railroad Co. v. R. Hudson Burr et al. Railroad Commissioners*, 63 Fla. 491, the

court held that when officers of the state act under invalid authority, or exceed or abuse their lawful authority, and thereby invade private rights guaranteed by the Constitution, an action to redress injuries caused by the unauthorized act is not a suit against the state, since the acts of officials that are not legally authorized or that exceed or abuse authority of discretion conferred upon them are not acts of the state.

In *Louisville & Nashville R. Co. v. Bosworth et al.* 209 Fed. 380 (District Court, E. D. Ky. Frankfort Division, 1913), the court held that the right to maintain a suit in a federal court against state officers to enjoin them from taking action which they threaten to take in the name of and for the state is not limited to cases where such action is to enforce or pursuant to an unconstitutional statute, but such suit is not against the state and is maintainable if for any reason the officers have no right to take such action, and it will be a wrong to plaintiff such as equity will enjoin.

The court held that the true test of the maintainability in a federal court of a suit to enjoin state officers from doing an act in the name of and for the state as against the objection that it is a suit against the state is to be found in the consideration of the relief sought therein. If it is relief against the state the suit is not maintainable, since the state, although not made a party to the record, is an indispensable party to the suit, but if the sole relief sought is against the officers to prevent them from enforcing an unconstitutional law or acting in excess of the law, it is maintainable, although the state may be affected by the result and would be a proper party.

The court further held that action against state officers who are proceeding under an unconstitutional stat-

ute should be enjoined because *action thereunder is a wrong to the plaintiff* and that *action under a constitutional statute but in excess thereof and not within the statute* should be enjoined, because such *action would likewise be a wrong to the plaintiff*.

Robert L. Greene (successor of Henry M. Bosworth), Auditor, Sherman Goodpaster, Treasurer, and James P. Lewis, Secretary of State, constituting the Board of Valuation and Assessment for the *State of Kentucky* *et al. Appts. v. Louisville & Interurban Railroad Company*, 244 U. S. 499, 61 L. Ed. 1280 (No. 617) not only holds that a suit in a federal court against state officers to enjoin them from taking action in the name of and for the state, under color of their offices, to enforce an unconstitutional statute, is not a suit against the state, but holds that the *principle* is not confined to a suit to enjoin an *unconstitutional statute*, but also *applies in a suit to enjoin state officers and boards from exercising an excess of power not authorized by a statute, though the statute itself be constitutional*.

The following is quoted from 25 Ruling Case Law, 414, Section 51 (the italics being ours):

"The state's immunity from suit does not extend to a suit against state officers to enjoin the threatened enforcement of an unconstitutional enactment to the injury of the rights of the plaintiff to constitutional rights. In such circumstances the law affords such state officers no protection. They are judicially regarded as acting in their personal capacities only. In other words, the acts of officials that are not legally authorized or that exceed or abuse the authority of discretion conferred upon them are not acts of the state. From this it is obvious that where action taken by state officials is unauthorized and substantially impairs private rights in violation of the Constitution it will not be enforced."

VIII.

THE SUBMISSION WHICH GAVE RISE TO DECISION 218 DID NOT INVOLVE ANY DISPUTE AS TO RULES AND WORKING CONDITIONS.

The submission concerned the character of employee representation for conference with the carrier under Title III of the Transportation Act of 1920. It *did not* involve any dispute between carrier and employees over *rules and working conditions*. No *dispute* as to *rules and working conditions* was *pending* between carrier and employees and such a dispute could not, therefore, have been the subject matter of any decision by the Labor Board. The questions pending before the Board which gave rise to Decision 218 (Pr. Rec., 92) arose on an *ex parte* submission by heads of labor unions, as such, inquiring whether or not a carrier could be compelled to *meet in conferences* contemplated by Section 301 of said Title III, *labor unions, as such, and system federations of labor unions, as such*, instead of *individual representatives* selected by its employees from among its *union, and nonunion employees alike*, who were *personally* interested in the subject matter of dispute.

The submission to the Board was made by the Railway Employees Department of the American Federation of Labor on behalf of System Federation No. 90. On such *ex parte* submission the Labor Board declared in Decision 218, though not involved, and though no complaint against the rules and working conditions so agreed upon had been made to the Board, that the rules and working conditions so negotiated and the contracts based thereon were void, ordered another election held,

prescribed qualifications for voting, prescribed the form of ballot to be used, and authorized the selection of labor unions, as such, and system organizations of labor unions, as such, as representatives of union labor to meet the carriers in conference.

IX.

THE BOARD IS NOT ENDOWED WITH ANY DISCRETION EXCEPT AS TO SUCH FUNCTIONS AS ARE IMPOSED UPON IT BY LAW. THE SELECTION OF CONFEREES FOR CONFERENCES IS NOT SUCH A FUNCTION.

The United States Circuit Court of Appeals reversed the decree of the United States District Court and remanded the cause to the District Court with directions to dismiss the bill. The District Court had construed the controlling sections of Title III. That court held that the Labor Board was not authorized to direct or control the method of selecting representatives of employees under Section 301, or to dictate the character of such representation whether individual or organization. That court further held that the appointment, method of selection, or the character of conferees within the contemplation of Section 301 was not one of the functions delegated to the Board by paragraph 4, Section 308, and that the Board was without power to make the regulations prescribed in its Decision 218. (Pr. Rec., 98-102.)

The Circuit Court of Appeals refused to consider or construe the controlling sections of said Title III but assumed, without justifying its assumption by reference to anything contained in said Title III, that the question involved was within a discretion conferred upon the

Board by law. The following is quoted from the opinion (Pr. Rec., 177-178):

"Whether the employees may, if they so choose, be represented by an organization as held by the Board, or whether they may be represented only by individuals who were employees of the same employer as contended by appellee is not properly a question for a court. * * * But in so far as it was for the Board in its discretion to determine who was in fact the authorized representative of bodies of employees, that question, and the manner of its disposition, was for the Board, no question here arising as to the Board's good faith or its abuse of discretion. Even though the court were of the belief that more just and true representation would result through the method of appellee, it is not for the court to substitute its opinion for that of the Board in matters by law committed to the Board."

If the Labor Board is endowed with such a discretion it must be so endowed by law, either expressly or by necessary implication. Such discretion cannot be assumed. If it does not so arise there is no discretion. To determine whether or not a discretion exists we must look to the law under which it is claimed. If such discretion is not expressly conferred thereby construction thereof may determine whether or not such discretion arises out of the act by implication. Title III neither expressly nor by implication confers any discretion upon the Labor Board as to the subject matter here involved. The Circuit Court of Appeals merely assumes that it does and, without giving any reason therefor, holds that the Labor Board is endowed with a discretion as to the questions here involved and that its acts and doings in the premises cannot be reviewed and thereupon reverses the decree of the District Court, remands the cause, and directs that the bill be dismissed.

The Circuit Court of Appeals evidently regarded the

controlling question here to be "whether the employees may, if they so choose, be represented by an organization as held by the Board, or whether they may be represented only by individuals which were employees of the same employer as contended by appellee." (Pr. Rec., 177.)

The court, however, refused to pass on the question, holding, as stated hereinbefore, that the law submits that question to the discretion of the Board to determine, and that the court cannot substitute its opinion for the opinion of the Board. In referring to representatives of employees to confer with the carrier the court had under consideration such representatives as Section 301 of Title III contemplates. No other section of the act concerns representatives of employees and conferences between representatives of employees and representatives of carriers. The court could not therefore have had any other section in contemplation. If a discretion is vested in the Board to determine that employees may be represented in conferences with carriers by labor unions, and system federations of labor unions, as such, as held by the Circuit Court of Appeals it must be conferred by the express language of Section 301, or it must arise out of and under Section 301. Unless it is so conferred, or does so arise, there is no such discretion.

Section 301 makes it the duty of carrier and employees *to avoid any interruption to the operation of any carrier* growing out of disputes between carrier and employee. It provides that all *such* disputes, that is, disputes which may interrupt the operation of any carrier, shall be *considered* and if possible *decided in conference* between *representatives* designated and authorized so to *confer* by the carrier or the employees or subordinate officials thereof *directly interested in the dis-*

pute. As to such conference, and the selection of representatives therefor, the section imposes no duty upon the Labor Board. The section imposes a duty upon carrier and employee alike to settle *such* disputes as the section contemplates if it is possible to do so in conference between the *carrier and representatives of its employees directly interested in the dispute.* The selection of representatives for such conferences is committed to carrier and employee. As to such representatives, their selection and election, the Labor Board has no concern or duty. The last sentence of the section is as follows:

"If any dispute is not decided in such conference it shall be referred by the parties thereto to the Board which under the provisions of this Title is authorized to hear and decide such dispute."

Under this section the Labor Board may acquire jurisdiction over the subject matter of such a dispute as is contemplated by the section, not settled in conference between the carrier and the representatives of its employees directly interested in the dispute, but jurisdiction over such dispute can only attach when it is "*referred by the parties thereto*" to the Board. No reference of any unsettled dispute was here made to the Labor Board under Section 301. The *discretion*, if any, vested in the Labor Board to hear and decide such disputes as said section contemplates which have not been settled in conference between carrier and representatives of its employees, and which the carrier and representatives of its employees have jointly referred to the Board to hear and decide is not involved. The disputes contemplated by said section do not include every dispute which may arise between carrier and employee, nor do they include disputes as to matters of railroad management and railroad procedure. By the language of the section disputes con-

templated thereby are disputes which if settled will avoid an interruption to the operation of a carrier and concern wages, rules, working conditions and grievances growing out of the administration of the same. If *under the provisions of Section 301 any discretion is conferred upon the Labor Board in hearing and deciding disputes it is, under the language of the section, only disputes which may result in an interruption to the operation of the carrier, and which the carrier and the representatives of its employees directly interested have been unable to settle in conference, and which they have jointly referred to the Board for hearing and decision. It cannot be contended that a joint submission of any unsettled dispute was here referred to the Labor Board by carrier and representatives of its employees for hearing and decision under the provisions of Section 301.* Therefore Circuit Judge Page, sitting in the District Court, in his opinion herein said (Pr. Rec., 139):

“The further conclusion is inevitable that the Labor Board was without power to intervene in any way in the proceedings contemplated by Section 301 preceding a reference to it jointly by the parties

The language of Section 307 strongly supports my conclusion upon Section 301 because Section 307 makes ample provision for intervention on the part of the Labor Board in all cases arising under the act where the carrier and the employees have failed to compose their difficulties or upon such failure to join in a submission to the Labor Board as provided in Section 301.”

No other section of Title III concerns representatives of carriers and employees. No other section thereof concerns conferences between carriers and representatives of employees “directly interested in the dispute.” No joint submission was here made, or attempted to be

made, to the Labor Board of an unsettled dispute for hearing and decision under Section 301. It follows that the discretion, if any, conferred upon the Labor Board to hear and decide disputes jointly referred to it for arbitration under the provisions of Section 301 does not attach here. No discretion is conferred upon the Labor Board to hold that employees of a carrier may be represented in conferences contemplated by Section 301 by labor unions and system federations of labor unions, as such. The discretion, if any, vested in the Labor Board under this section does not include, attach to and cover the question here involved or authorize the palpable usurpation of power which inheres in Decision No. 218, which was condemned by Judge Page in the District Court, was not approved but excused by the Circuit Court of Appeals as being within a supposed discretion, but which alleged discretion the act does not confer upon the Labor Board expressly or by implication.

Notwithstanding the plain and apparent meaning of the language of Section 301 the Circuit Court of Appeals said (Pr. Rec., 173) :

"Section 301 by its terms is applicable to any dispute between the carrier and the employees. If the concluding sentence of the section, providing that in case the dispute is not decided in conference it shall be referred 'by the parties thereto' to the Board authorized to deal with the dispute, means that unless *both* parties agree so to refer it, the Board cannot in any event deal with the matter Title III might as well not have been enacted; for if the right of the Board to act depended upon the joint submission of the parties to the dispute it lay in the power of either party to block utterly any action by the Board, by simply refusing to join in the submission."

Evidently the Circuit Court of Appeals misapprehends the character of disputes contemplated by Section

301. In the first sentence of the paragraph just quoted the court says that Section 301, by its terms, is applicable to "any dispute between the carrier and the employee." But as stated hereinbefore Section 301 neither includes nor contemplates *any* dispute between carrier and employee, but *such disputes only* as may interrupt the operation of a carrier if unsettled. The court quotes from the section the following: "any dispute between the carrier and the employees," but omits the context thereby enlarging the meaning of the language quoted. The complete sentence from which the court so quotes is as follows (the italics being ours):

"It shall be the duty of all carriers and their officers, employees and agents to exert every reasonable effort and adopt every available means *to avoid any interruption to the operation of any carrier* growing out of any dispute between the carrier and the employees or subordinate officials thereof."

The disputes which are contemplated by the foregoing sentence are disputes which if settled will avoid interruption to the operation of carriers—not every possible dispute, important or unimportant—but such disputes only as may interrupt the operation of the carrier if not settled. Disputes which our common experience teaches us may result in the interruption of the operation of carriers are disputes which relate to wages, rules, working conditions and grievances arising out of the administration thereof. As to joint submissions under Section 301 the court says (Pr. Rec., 173) that under such construction "it lay in the power of either party to block utterly any action by the Board by simply refusing to join in the submission." But Section 307 expressly provides for an *ex parte* submission to the Labor Board of any dispute involving grievances, rules, working conditions or wages which has not been decided as

provided in Section 301—that is in conference, or on joint submission to the Board—and which said Board is required to receive for hearing and decision. Under Section 307 not only is the carrier, or its employees, authorized to make *ex parte* submissions of disputes involving grievances, rules, working conditions and wages which have not been decided in conference or under the provisions of Section 301, but the Labor Board itself is endowed with a discretion on its own motion to take jurisdiction of *such dispute* if it is of the opinion that it is *likely substantially to interrupt commerce*. Section 301 requires carriers and employees through their representatives to endeavor to settle disputes which may avoid an *interruption to the operation of a carrier*. Section 307 authorizes the Labor Board on its own motion to take jurisdiction of any dispute involving grievances, rules, working conditions and wages which is *likely substantially to interrupt commerce*. Thus the effort to ignore the plain meaning of the language of Section 301 fails, not only because of the plain meaning of the language used, but because Section 307 meets the court's criticism of Section 301 by authorizing either party to make an *ex parte* submission of disputes which in our common experience may lead to an interruption in the operation of carriers, and thereby substantially interrupt commerce, not under a submission by the *parties*, but under an *ex parte* submission by either party. Section 301 provides for voluntary submission to arbitration. Section 307 provides for compulsory arbitration. It is not true, therefore, that it is in the power of either party "to block utterly any action by the Board by simply refusing to join in the submission."

Section 307 authorizes the Labor Board upon acquiring jurisdiction of the subject matter covered by that

section to receive for hearing and as soon as practicable and with due diligence decide the subject matter of dispute. If this section confers any *discretion* upon the Labor Board it is to hear and decide disputes submitted in accordance with and under its provisions and is confined to disputes involving grievances, rules, working conditions and wages. The section does not confer power upon the Labor Board to determine who may represent employees of a carrier in conferences contemplated by Section 301, nor does it confer power upon the Labor Board to receive and hear anything else than the things specified therein, and then only under and in accordance with its provisions.

Under Section 308 the Labor Board has a *discretion* as to its organization, as to meeting at other places than Chicago and as to regulations necessary for the efficient execution of the functions vested in it by Title III, but not to make regulations for the execution of functions not vested in it by this title. As said in the opinion of Judge Page in the District Court (Pr. Rec., 189) :

“The appointment or method of election of conferees under Section 301 was not one of the functions delegated to the Board.”

Title III does not authorize the Labor Board to prescribe its functions. The act prescribes its functions. The act does not authorize the Board to hold that in conferences under Section 301 employees of carriers may be represented by general chairmen of labor unions, and system federations of labor unions, as such. No such power is conferred upon it and no such *discretion* arises under the act. To so hold is not one of the functions conferred on the Board.

In Decision No. 119 the Labor Board nevertheless assumed power to compel carriers to meet in conference

labor unions and system federations of labor unions, as such. That decision declared that rules and working conditions agreed upon in conference between carriers and representatives of their employees must be consistent with the principles promulgated and attached thereto as Exhibit B. (Pr. Rec., 75.) Sixteen principles were so promulgated and attached. (Pr. Rec., 84-86.) Principle No. 5 declares the right of lawful organizations to act toward lawful objects through representatives of their own choice, whether employees of a particular carrier or otherwise, and requires the carrier to agree thereto. Principle No. 15 declares that the majority of a craft or class of employees shall have the right to determine *what organization* shall represent its members in conferences or otherwise. The Pennsylvania Railroad Company refused to confer with representatives of its employees who were not in its employ, or to confer with labor unions and system federations of labor unions, as such, as representatives of its employees. It recognized a duty to meet in conference representatives of all its employees as to disputes contemplated by Title III, whether such representatives were, or were not, members of labor unions, and whether such representatives were or were not heads of labor unions, but it insisted that the law does not make it its duty to confer as to such disputes with representatives of its employees who are not in its service and directly interested in the dispute, or with officers and heads of labor unions and system federations of labor unions, as such.

In an opinion filed by the Labor Board on September 16, 1921 (Pr. Rec., 116), the Board endeavors to justify said principles as follows:

"It is a settled principal of law that under a remedial act, as this is, even where not expressly given

sufficient powers are implied to enable the purposes of the act to be accomplished. But in this instance the power is expressly given by the language of the statute, namely, 'The Labor Board may make regulations necessary for the efficient execution of the functions vested in it by this title.' "

Here the Board declares that its power to promulgate said principles is express and is conferred by the foregoing quotation from paragraph 4 of Section 308 of Title III. But Section 308 deals with board procedure only. Said paragraph 4 does not confer upon the Board general power to make regulations but a *limited power* to make *only* such *regulations* as are "*necessary*" for the efficient execution of functions "*vested in it by this title.*" The Board cannot justify its promulgation of said principles 5 and 15 by anything contained in Section 308 of Title III which section relates, as its plain language shows, only to its organization and procedure as a board. Nevertheless the Board assumed to promulgate principles 5 and 15 and determined that The Pennsylvania Railroad Company had violated said principles by refusing to conform thereto, and announced as a policy, that it would withhold from any carrier or employee which refused to conform to its decisions the protection of the law upon any matter arising after such refusal.

In his opinion Circuit Judge Page, sitting in the District Court, said referring to the power of the Board to direct or control the method of selecting representatives of employees (Pr. Rec., 139):

"It is in a general way claimed that the Board has the right to direct or control the method of selecting the representatives of the employees under Section 301 under the provisions of Section 308 (4), which is as follows:

The Labor Board 'may make regulations neces-

sary for the efficient execution of the functions vested in it by this title.'

The appointment or method of election of conferees under Section 301 was not one of the functions delegated to the Board and therefore it had not the right to make the regulation provided for in Decision No. 218 on pages 8, 9 and 10. I am of opinion that the purpose of Section 301 was to leave to the carrier and its employees full liberty to get together in their own way."

Here Judge Page disposes of the contention of the Labor Board that the law confers power upon it to require carriers to meet in conference representatives of its employees who are not in its employ, or with labor unions, and system federations of labor unions, as such, holding as he does that the appointment or the method of election of conferees under Section 301 is not a function delegated to the Board under the language used in said paragraph. He could have held nothing else.

Nevertheless, referring to said paragraph 4 of Section 308 the opinion of the Circuit Court of Appeals says, the italics being ours (Pr. Rec., 177) :

"It is urged for appellee that the matter of the election of representatives by the employees is wholly procedural and is something with which the Board is in nowise concerned and its action in this regard was wholly beyond its jurisdiction. The force of the contention is not apparent. Title III confers on the Board important duties and prescribes in Section 308 (4) that it 'may make regulations necessary for the efficient execution of the functions vested in it by this title.' This, alone, if indeed in the very nature of things it were not necessarily so, would empower the Board to make provisions for determining whether those purporting to represent disputants *before the Board* do in fact so represent them."

Thus the Circuit Court of Appeals, like the Board, justifies the promulgation of said Principles 5 and 15

by a section of Title III which concerns board procedure, and board procedure only. The court does not find express power to promulgate said principles as the Board did but justifies them under said paragraph 4 of said section because under said paragraph the Board is assumed to have a right to determine "whether those purporting to represent disputants *before the Board*" do in fact represent them, or if they cannot be so justified, by asserting that the Board is so empowered "in the very nature of things." Without construing the various sections of the act which confer power upon the Board, and out of which power may arise, to ascertain the source of the power claimed, the court arbitrarily refers the power to said paragraph 4. But the question here does not involve the *power of the Board to determine* "whether those purporting to *represent disputants before the Board* do in fact represent them" but whether the Board can compel *carriers to confer with labor unions, as such, and with persons not in the employ of the carrier*, and who are not interested in the subject matter in dispute.

It follows from the foregoing, quoted from the opinion of the Circuit Court of Appeals, that power to promulgate Principles 5 and 15 does not depend alone upon a *supposed discretion or upon paragraph 4 of Section 308*, but on the "very nature of things" as well. Said paragraph 4 concerns regulations for "the efficient execution of the functions vested" in the Board by Title III. What are the functions vested in the Board? They are the duties which the title imposes on the Board and are set forth in Sections 301 and 307 so far as disputes between carrier and employees are concerned. As to representatives of employees and conferences with carriers the title imposes no duty. All other sections

of the act concern Board procedure. Under the plain language of Sections 301 and 307 the Board is not empowered to act unless upon a submission to it of *such disputes as are contemplated by said sections*, by joint submission under Section 301, and upon an *ex parte* submission at the instance of carrier, employees, subordinate officials, adjustment boards, or upon the Labor Board's own motion under Section 307. The construction of the controlling sections of Title III in the District Court accords with the plain meaning of the language thereof.

X.

TITLE III NEITHER DIRECTLY, NOR INDIRECTLY, IMPOSES LABOR UNIONS, AS SUCH, OR INDIVIDUALS NOT IN ITS EMPLOY, UPON THE CARRIER, AS CONFEREES IN CONFERENCES CONTEMPLATED BY THE ACT.

As a reason why carriers must meet labor unions and system federations of labor unions, as such, and individuals not in the employ of the carrier, as representatives of their employees in conferences, the Circuit Court of Appeals says (Pr. Rec., 178):

"Title III in several instances recognizes representation of employees by organizations (Secs. 302, 303, 307 (a) and (b), 309, 313), and that this was largely the practice with many carriers before the Government control and generally so during Government control, the National Agreements having been so negotiated."

The National Agreements referred to by both the Board and Circuit Court of Appeals were negotiated by the Director General of Railroads during federal control. The railroad companies, whose properties were taken from them and were being operated by the Gov-

ernment, were not parties to said agreements. They had no voice in the negotiation of rules, working conditions and wages provided for therein. The Pennsylvania Railroad Company had not theretofore and has not since negotiated wages, rules and working conditions for its shop crafts with labor unions or system federations of labor unions. It was an open shop railroad before federal control and upon the return of its property it continued its open shop policy and has so continued it to the present time. It denies that its right to maintain and so operate can be taken away. It denies that it can be compelled to recognize labor unions and system federations of labor unions as factors in the conduct of its business. It has not at any time closed its doors against union labor. It employs men who are possessed of the necessary qualifications for the particular work to which they aspire whether they are or are not members of labor organizations. It recognizes the right of its employees, both union and nonunion, to representation in conferences concerning matters in which its employees are interested. It insists, however, that such representatives shall be individuals directly interested in the dispute whether they are or are not members of labor unions. It will not enter conferences with men who are not in its employ, nor with labor unions and system federations of labor unions, as such, as representatives of its employees. The Pennsylvania Railroad Company denies power in Congress to constitutionally compel it to so confer. It denies that Title III contemplates that it should so confer. It denies that the act expressly, by implication or under a discretion, authorizes the Labor Board to require it to so confer. The right to deal with individual representatives of its employees as to matters contemplated by Sections 301

and 307 is an inherent right which cannot constitutionally be taken from it, and which said Title III does not contemplate. It is true that Title III in certain sections recognizes representation of employees by organizations as asserted in the opinion of the Circuit Court of Appeals. But no section referred to in that opinion supports an inference that the law intends to compel *carriers* to meet in conference other than individual representatives of its employees who are directly interested in the subject matter before the conference. It will be noted that the court in referring to sections which recognize representation of employees by organizations does not refer to *Section 301 which is the only section which concerns conferences between carrier and representatives of its employees*. Section 301 specifies "carrier or the employees or subordinate officials whose members are directly interested in the dispute." It does not specify or refer to organizations of employees, labor unions, or system federations of labor unions. The court refers to Section 307 as recognizing representation of employees by organization, but the term "organization of employees" as used in Section 307 is limited to and concerns only *ex parte applications for hearings* before the Board under Section 307 and has no application to Section 301. The term "organization of employees" as used in Section 307 is not contained in Section 301, and Section 307 does not concern representatives of employees for conferences, but concerns only *ex parte applications for hearings upon subjects contemplated thereby*. Section 302 is referred to but it relates only to the establishment of Railroad Boards of Adjustment by Agreement. The term "organization of employees" as used in Section 303, also referred to, like Section 307, applies to and concerns only *ex parte applications* before the Board under Section 303.

lications for hearings before the Board upon matters contemplated by said section and has no application to and does not concern representatives of employees for conferences with carriers. Section 309 is inapplicable for the purpose for which the court cites it inasmuch as it merely provides that any party to any dispute to be considered by an adjustment Board, or by the Labor Board shall be entitled to a hearing either in person or by counsel and nothing more. Section 313 merely authorizes publication of carrier, employee or subordinate official or organization thereof for violations of a decision of the Labor Board or of an adjustment board.

The foregoing sections, so referred to by the court, shed no light upon the question here involved. They neither show, nor tend to show, that Title III confers power on the Board to compel carriers to confer with labor unions and system federations of labor unions, as such, as representatives of its employees in conferences contemplated by Section 301 rather than with individual representatives selected from its employees, both union and nonunion, nor do said sections disclose power in the Board to compel carriers to confer with representatives of their employees who are not directly interested in the dispute, and who are not in their employ.

The opinion of the Circuit Court of Appeals does not arise out of a construction of Title III but is based upon the assumption that the act confers a *discretion* upon the Labor Board to compel the carrier to confer in conferences contemplated thereby with representatives of its employees who are not in its employ, or with labor unions and system federations of labor unions, as such, rather than with individual representatives who are directly interested in the dispute. It is insisted by The Pennsylvania Railroad Company that such discretion is not conferred by the act.

XI.

IF THE LABOR BOARD INHERITED JURISDICTION OVER DISPUTES CONCERNING RULES AND WORKING CONDITIONS IT WAS OUSTED OF JURISDICTION WHEN THE PENNSYLVANIA RAILROAD COMPANY AND ITS EMPLOYEES SETTLED SUCH DISPUTES.

It appears from the opinion of the Circuit Court of Appeals that during federal control of railroads, and prior to the passage of the Transportation Act, certain disputes were pending and undetermined respecting wages and working conditions; that immediately after the Transportation Act became a law and the railroads were returned to their owners the Labor Board was organized and said undetermined disputes were taken up for hearing and consideration; that the disputes were divided into two classes—one concerning wages and the other concerning rules and working conditions; that the Board settled the dispute concerning wages (Pr. Rec. 174) but by its Decision No. 119 called on employers and employees of the various railroad systems to confer and if possible agree upon rules and working conditions; that if at the time Decision 119 was promulgated the dispute as to rules and working conditions was pending before the Board it was entirely proper for the Board to request the parties to confer and if possible agree without thereby losing its jurisdiction over the subject matter of the reference; that if pursuant to the request, or even without request, employers and employees should get together and agree there would then be no pending dispute as to working conditions; that if no agreement was reached the dispute as to working conditions would still be within the jurisdiction of the Board just as if

it had not been so referred to employers and employees for settlement. (Pr. Rec., 176, 178.) The court declares that by Decision 119 the Labor Board "called upon employers and employees of the several systems to *confer together* and if possible agree respecting" rules and working conditions. In referring the dispute as to *rules and working conditions* to employers and employees of the several systems *for conference* the Board necessarily understood that such conferences could only be held under Title III of the Transportation Act—that title being a limitation upon the power of the Board. Knowing that such conferences would be held under Title III the Board must also have known that Section 301 was the only section which concerned such conferences—not on orders from the Board—but as a duty imposed by the act upon carriers and employees and as to which the Board had no duty. If as a result of such reference conferences were held, and rules and working conditions were established which were accepted and conformed to by all employees, union and nonunion alike, the dispute as to rules and working conditions would no longer exist and the alleged jurisdiction of the Board as to rules and working conditions would be at an end. The dispute as to rules and working conditions having terminated it would not be material whether the representatives of the employees in conference were labor unions and system federations of labor unions, as such, or individual representatives of its employees in its service. If the representatives selected conferred with the employers and agreed upon rules and working conditions, which agreements were accepted and conformed to by all employees, union and nonunion alike, no dispute remained as to rules and working conditions between such employers and em-

ployees and there could have been no reversion to the Board of the subject matter of its reference under Decision 119. The union employees did not complain to the Board against the rules and working conditions so established but conformed to them in every particular. If such rules and working conditions had been unjust, or worked any hardship, or were for any reason unsatisfactory to union employees, Section 307 authorized them, and other employees who were directly interested in the rules and working conditions so established, on *ex parte* submissions, to submit the same to the Board for hearing and decision on complaints against the rules and working conditions so in force and effect, as well as against grievances arising out of the administration thereof.

Rules and working conditions having been agreed upon between The Pennsylvania Railroad Company and its employees, and such agreements having been reduced to contract, and all employees of The Pennsylvania Railroad Company having accepted the same, and having commenced work thereunder without complaint there remained no undetermined dispute between that company and its employees as to rules and working conditions and if any such dispute had theretofore been before the Board for decision and determination, its jurisdiction was lost by the settlement of the dispute and the contracts entered into between the carrier and all its employees which were thereafter in full force and effect. The dispute as to rules and working conditions having been disposed of jurisdiction of such dispute could not again vest in the Board.

Referring again to the Board's jurisdiction over work-

ing conditions the Circuit Court of Appeals says (the italics being ours) (Pr. Rec., 175):

"The Transportation Act changed the law, but it did not change the fact of the pendency of the serious dispute respecting *wages and working conditions*. The fact that the *dispute existed* long before the Board was created made it none the less a *dispute cognizable by the Board* if *continuing to exist after the Board began to function*. It is thus apparent that at the very outset *this dispute as to rules and working conditions* was before the Board, and was so treated by both parties to the *dispute*, including *appellee*. Under these circumstances it would be immaterial whether it got there by *ex parte* or joint submission or on the initiative of the Board itself."

This paragraph is based upon an alleged inherited jurisdiction and assumes that transition from federal to company control carried such jurisdiction with it as to working conditions. But working conditions were not involved under the record here, nor was any question alleged to be inherited within the foregoing quotation. The court again asserts that the dispute as to working conditions existed long before the Board was created and, being an existing dispute, when the Board was organized that body inherited jurisdiction to hear and decide the same. If jurisdiction was so inherited it is true that the subject matter thereof did not reach the Board under the provisions of the Transportation Act either by *joint reference*, by *ex parte submission*, or on the *initiative of the Board itself*. The court asserts jurisdiction in the Board to dispose of such disputes if the disputes "*continued to exist after the Board began to function*," from which we infer that the jurisdiction of the Board to hear and settle said disputes ceased when such disputes were settled whether by the

Board or directly by the parties interested. Having been settled the jurisdiction of the Board ceased because the dispute ceased. If thereafter another dispute should arise as to rules and working conditions between the same employer and its employees the Board could not take jurisdiction thereof as an inherited dispute but could only acquire jurisdiction of the same as provided by said Title III, by joint reference, by *ex parte* submission to the Board or on the initiative of the Board itself. But the agreement between the employer and employees as to rules and working conditions, and the action of union and nonunion employees alike, in conforming to the same settled the alleged inherited dispute and the jurisdiction of the Labor Board was at an end. The inherited dispute as to rules and working conditions having been settled by contracts covering rules and working conditions, jurisdiction thereover was gone forever. The alleged dispute, here involved, which the court had before it did not arise as an inherited dispute as to *rules and working conditions*, but on an *ex parte* submission of questions, admitting that rules and working conditions had been agreed upon but complaining that labor organizations, as such, were not recognized in selecting representatives to confer with the carrier. Of this question the Board had no jurisdiction, either inherited or under Title III. Therefore the force of the foregoing quotation from the opinion is not apparent. No complaint against the rules and working conditions so negotiated, agreed upon and conformed to by all employees on the lines of The Pennsylvania Railroad Company was ever made to the Board, and no such complaint is involved. It does appear by the Board's Decision 218 (Pr. Rec., 92) that the federated shop crafts of the Pennsylvania System by B. M. Jewell, president of the Railway

Employees' Department of the American Federation of Labor, made an *ex parte* submission to the Board of three questions as follows:

1. Has a majority of the employees of any craft on the Pennsylvania System the right to designate an organization to represent said employees in negotiating an agreement with the carrier covering rules and working conditions?
2. Has a majority of the employees of such craft the right to be represented in such negotiations by anyone other than an employee of said carrier?
3. Has the carrier complied with the law in the method pursued by it to ascertain who are representatives of the shop employees with whom it shall negotiate rules?

These *ex parte* questions, so submitted to the Board, not inherited by it, are alone responsible for Decision No. 218. (Pr. Rec., 92.) But Title III does not authorize the Board to take jurisdiction of *such ex parte* inquiries, to render decisions thereon and to publish carriers for refusing to comply therewith. If it assumes to do so it acts under a usurpation of power. *Ex parte* submissions can be made under Section 307—but only as to matters there specified. Such specification includes wages, rules and working conditions and grievances arising out of the administration thereof. The foregoing questions are not, nor is either of them, within said section and such *ex parte* submission did not confer jurisdiction upon the Board to render any authoritative decision thereon. The questions so submitted included no complaint against the rules and working conditions agreed upon and then in force. No suggestion of injustice, of hardship, or of grievance arising out of such rules and working conditions was submitted to the

Board for determination by said questions, or either of them. It was not denied that rules and working conditions had been agreed upon and were then in full force and effect on the lines of The Pennsylvania Railroad Company. The submission did not complain against the justness of said rules and working conditions so agreed upon and the Board in declaring, as it did, in said Decision 218 that the rules negotiated between the representatives selected and the railroad company are void and of no effect was guilty of a usurpation of power and in threatening to publish the company under Section 313 unless it submitted to the decision was guilty of the exercise of such excess of power as to merit condemnation in the courts rather than protection.

It is apparent from the questions so submitted that the heads of the labor unions Mr. Jewell represented were not complaining against said rules and said working conditions, but were interested in their own official supremacy and union control. Each question so submitted looks to the recognition of labor unions, as such, as the representatives of union employees in conferences between the carrier and its employees. Inasmuch as no complaint was made by employees under Section 307, as was authorized, or by the chief executive of any organization of employees as there authorized, against the rules and working conditions established and then in force the attitude of the Labor Board in taking jurisdiction of said submission should be condemned instead of upheld under a supposed discretion which the courts cannot control.

XII.

THE BILL ALLEGES, AND THE MOTIONS TO DISMISS ADMIT, THAT THE LABOR BOARD DETERMINED THAT THE PENNSLYVANIA RAILROAD COMPANY HAD REFUSED TO CONFORM TO ITS DECISION 218 AND THEREUPON ORDERED PUBLICATION AGAINST SAID COMPANY UNDER SECTION 313. THE ADMISSION PRECLUDES THE SUGGESTION IN THE OPINION OF THE CIRCUIT COURT OF APPEALS THAT THE MOTION TO VACATE DECISION 218 IS STILL PENDING BEFORE THE BOARD.

The following is quoted from the opinion of the Circuit Court of Appeals (the italics being ours) (Pr. Rec., 178-179) :

“That the *question* whether the employees have in fact *consented* to the *rules and working conditions* which appellee announced *is still pending before the Board*. In its last order made on petition of appellee to set aside Decision No. 218 the Board granted the *petitioner's request to present its views on certain questions*, among them as to how the *representative capacity of those representing unorganized labor shall be ascertained* and of the *adoption or ratification of appellee's rules and working conditions by representatives of the crafts fairly selected by a majority of the employees of the class*. An early date for that *hearing was set but it does not appear that it has taken place*, the next action shown of record being the filing of the bill herein.”

The order of the Board upon the petition to vacate authorized the carrier to present its views on the following matters (Pr. Rec., 122) :

“1. The question as to what employees, if any, not in the actual and active service of the carrier, such as men laid off, furloughed or absent upon leave, shall be permitted to vote in the election of representatives to negotiate agreements on rules and working conditions.

2. The question of how the representative capacity of the spokesmen of unorganized employees shall be ascertained.

3. The carrier will be permitted to offer such evidence as it may see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class."

The Board declined to grant a rehearing upon the questions of substance raised in the carrier's petition.

The Board thus authorized the carrier to present its further views on the question of what employees, if any, not in the actual and active service of the carrier should be permitted to vote in the election of representatives to negotiate agreements, rules and working conditions concerning which the Board had no duty, power, or discretion, and also upon the question of how the representative capacity of the spokesmen of unorganized labor might be ascertained concerning which the Board had no duty, power, or discretion, and also to offer such evidence as it might see fit of the adoption or ratification of its shop craft rules by the representatives of said crafts fairly selected by a majority of the employees of that class concerning which the Board had no duty, power, or discretion.

In its said application to vacate the carrier denied the power of the Board to dictate an election or to prescribe any rule by which the carrier should determine who were the authorized representatives of its employees and refused to submit itself to the jurisdiction of the Board by submitting further argument relative to the subject matter of said paragraphs 1 and 2. (Pr. Rec. 24.)

That as to paragraph 3 of said decision the carrier averred in its said application to vacate, that rules and

working conditions had been negotiated, and had been agreed upon between the carrier and the representatives of approximately 150,000 of its employees and the carrier denied there and denies here the right or power of the Board to set such agreements aside. (Pr. Rec., 24, 25.)

The carrier averred in its bill herein (Pr. Rec., 24) that said decision refused the carrier's request for an oral argument upon the matters of substance urged in the carrier's said application to vacate but granted it as to procedure. The carrier, however, declined to be heard upon questions of procedure and management, over which the Board was not authorized by the Transportation Act to assume jurisdiction, which were the only questions the Board opened to it for further argument on its said application to vacate. (Pr. Rec., 24.)

It is further averred in the bill (Pr. Rec., 26) that the Labor Board determined that the action of the carrier in refusing to conform to the terms of said Decision 218 was a violation of said decision and ordered the carrier published therefor under Section 313 of said Title III and that such publication would seriously and irreparably injure the property of the plaintiff.

The foregoing facts are not denied in the record. The Circuit Court of Appeals was in error in saying that the question as to whether the employees of The Pennsylvania Railroad Company were satisfied with the rules and working conditions so negotiated was still pending before the Board. *The record shows that the carrier refused to be further heard upon the questions which the Board authorized it to be heard upon and that thereafter the Board determined and announced a purpose to publish the carrier for refusal to conform to the provisions of Decision No. 218.* (Pr. Rec., 26.) Such de-

termination by the Board precludes the suggestion that questions growing out of the carrier's petition to vacate are still pending before the Board.

XIII.

THE CONSTITUTIONAL QUESTION RAISED BY THE PLEADINGS IS PERTINENT AND WELL TAKEN. THE CIRCUIT COURT OF APPEALS ERRED IN REFUSING TO CONSIDER THE SAME.

Upon the question of the constitutionality of Title III, in the first paragraph of the opinion, the Circuit Court of Appeals says (the italics being ours) (Pr. Rec. 171-172):

“Appellee contends that if Title III makes the decisions of the Labor Board binding upon the carriers, and enforceable by appropriate proceedings, it is unconstitutional. Suffice it to say, there is not here involved any proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions. Indeed, the action of the Board most complained of by appellee was in furtherance of securing an agreement between the carriers and their employees, with the probable alternative that if ultimately they fail to agree, the Board itself will decide upon and prescribe rules and working conditions. If and when this stage is reached, and one or both of the parties refuse to obey the Board's decision, it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties.”

Appellee has not and does not here contend “that if Title III makes the decisions of the Labor Board binding upon carriers, and enforceable by appropriate proceedings, it is unconstitutional.” The averment is not justified by the record. The Pennsylvania Railroad

Company has not refused to conform to any decision of the Board which Title III authorizes.

The contention of The Pennsylvania Railroad Company as to the constitutionality of Title III is shown by the following paragraphs quoted from the bill of complaint (Pr. Rec., 28) :

“Plaintiff avers that if upon consideration of said Transportation Act and said Title III, and upon a construction of said Title III, and each section thereof, it should be held by this Honorable Court that in and by the terms of said act said Board has power to hold that said election, and the said rules and working conditions negotiated by the employees' representatives, so elected, and the carrier, were respectively illegal, void and of no effect, said Title III of said Transportation Act and each section thereof is unconstitutional and repugnant to the Fifth Amendment to the Constitution of the United States.”

(Pr. Rec., 29) :

“Plaintiff avers that if upon construing said Title III this honorable court should hold that said Labor Board was authorized by said title to assume jurisdiction over the subject of procedure and railroad management by requiring the carrier and its employees to hold another election, and to hold contracts made by it void and of no effect, and, in the event of failure on the part of the carrier to comply with the decision of the Board entered under such assumed authority, to exercise the coercive and plenary powers granted to it by Section 313, then said Title III and each and every section thereof is unconstitutional and repugnant to Section 1 of Article I of the Constitution of the United States; to Section 1 of Article III of the Constitution of the United States, and to the Fifth, Sixth and Seventh Amendments to the Constitution of the United States.”

The Pennsylvania Railroad Company does not contend, as is charged in the foregoing quotation, “that if

Title III makes the decisions of the Labor Board binding upon carriers and enforceable by appropriate proceedings it is unconstitutional." The record shows that The Pennsylvania Railroad Company does contend that the act is unconstitutional if it was intended to confer power upon the Board to invalidate contracts which had been entered into with its employees and which were being conformed to, without complaint, by all its employees, union and nonunion, alike. It is insisted, however, by The Pennsylvania Railroad Company that said Title III does not so empower the Labor Board. The bill of complaint (Pr. Rec., 28) expressly denies that said Title III or any section thereof authorized the Board to declare said election illegal, the rules and working conditions so negotiated void, and to compel the carrier to confer with the general chairmen of labor unions.

Thus the only decisions of the Labor Board which The Pennsylvania Railroad Company has refused to follow are its Decisions 119 and 218, which seek to control the selection of conferees for conferences, under Section 301 of said title, and to declare void contracts covering rules and working conditions negotiated with its employees, union and nonunion alike, and with which its employees were satisfied, and against which no complaint was made. The Pennsylvania Railroad Company contends that if Title III authorizes the Labor Board to dictate the character of conferees to negotiate rules and working conditions and authorizes the Board to declare contracts negotiated with its employees, with which both parties are satisfied, void, said title is unconstitutional. From the foregoing quotation it would appear that The Pennsylvania Railroad Company resists all decisions of the Labor Board, and contends that if any decision of

the Labor Board is binding upon it, and enforceable, the act is unconstitutional. *It does not so contend.* Such averment is without support in the record.

As a reason why the Circuit Court of Appeals declined to pass upon the constitutionality of the act the opinion says (Pr. Rec., 171-172):

“Suffice it to say there is not here involved any proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions.”

But Decision 218 *declares the rules and working conditions so negotiated, and in force, void.* Such decision the Board promulgated. It determined to publish the carrier under Section 313 because it refused to submit to the decision—that is, *refused to give up rules and working conditions theretofore agreed upon between the carrier and its employees, and under procedure prescribed by the Board, to negotiate other rules and working conditions in lieu thereof.* By said decision, and the subsequent determination of the Board to enforce the same there *was* involved a “proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions.” Under the rule here announced by the Circuit Court of Appeals it is apparent that the constitutionality of the act was involved.

The following is quoted from the opinion and follows the foregoing quotation (Pr. Rec., 171-172):

“Indeed, the action of the Board most complained of by appellee was in furtherance of securing an agreement between the carrier and their employees with the probable alternative that if ultimately they failed to agree the Board itself will decide upon and prescribe rules and working conditions.”

But the record here shows that an agreement was entered into between the carrier and its employees as to

rules and working conditions which was satisfactory to all its *employees*, union and nonunion alike, and against which no complaint was made to the Board. Therefore there was no possible alternative that the Board could be called upon to prescribe rules and working conditions, acceptable rules and working conditions having been agreed upon and being then in force and effect.

If Title III authorizes the Board to declare contracts covering rules and working conditions void the constitutionality of the act, in so far as it so authorizes, is a pertinent question. Its consideration cannot be deferred until the Board itself has fixed rules and working conditions to which one or both of the parties decline to conform. To declare existing rules and working conditions void invites inquiry as to the power of the Board to so declare. If the language of the act authorizes it to do so its constitutionality may be challenged by a party injured and the question is apt for determination.

It appears from the printed record (pages 28-29), where the allegations charging the unconstitutionality of Title III will be found, that the contention does not rest alone upon the asserted power to declare rules and working conditions negotiated and reduced to contract, void, but also on the assumed power to set aside elections, as well as the rules and working conditions negotiated thereunder, and to compel carrier and employees to hold a second election for representatives under the provisions of said principles 5 and 15, to negotiate agreements and contracts between carrier and employees in lieu of the agreements and contracts it had declared invalid. Decision No. 218 declared the election of conferees for said conferences void because the carrier refused to recognize as eligible to election labor unions, as such, system federations of labor unions, as

such, and individuals dictated by unions who were not in the employ of the carrier. The decision declared the election void. It ordered another election to be held and declared labor unions, as such, system federations of labor unions, as such, and individual representatives not in the employ of the carrier to be eligible to election as conferees. The bill herein averred that Title III did not authorize the Board to determine eligibility to election as conferees but that if said title did so authorize, the act was unconstitutional. Decision 218 first declares the election at which said representatives were elected void. If the act authorized the Board to so declare it is unconstitutional. Decision 218 secondly declares rules and regulations negotiated by the representatives selected in said election void. If the act authorized the Board to so declare, it is unconstitutional. The Circuit Court of Appeals cannot justify its refusal to meet the constitutional question presented on the theory that the question does not involve "the enforcement on the carrier of a decision of the Board as to wages or working conditions." The Board does undertake to enforce upon the carrier *its decision* that said election was void as well as *its decision* that the rules and working conditions so negotiated were void. The decision was the Board's decision. The carrier denies its authority in the premises under the provisions of Title III and asserts that such authority cannot be constitutionally conferred. The constitutional question was pertinent under a decision holding that the Board was endowed with a discretion to render and enforce its Decisions 119 and 218. A discretion cannot be exercised which is not a constitutional discretion.

The Circuit Court of Appeals declares that the application for increase in wages and changes in rules and

working conditions descended to the Labor Board on termination of federal control. That these applications called disputes, the Board divided into two parts—one as to wages and the other as to rules and working conditions. That Decision No. 2 fixed wages for carriers to pay. That the subject of rules and working conditions was to be disposed of thereafter. *That some of the rules and working conditions materially affect wages.* That The Pennsylvania Railroad Company was a party to the proceedings before the Board which indicated that the company regarded the whole subject matter as before the Board (Pr. Rec., 174) for determination. But The Pennsylvania Railroad Company did not concede jurisdiction to the Board over the subject of rules and working conditions by inheritance from federal control. This appears from Board Decision 218 to which the Circuit Court of Appeals says (Pr. Rec., 174) "verity must be conceded." The following is quoted from Decision 218 (Pr. Rec., 94):

"The carrier further contends that the Board had not acquired jurisdiction in a lawful manner over the dispute regarding rules and working conditions when Decisions No. 2 and No. 119 were rendered."

Thus from this Board decision it appears that the carrier, though present, protested against the jurisdiction of the Board over the national agreements and the subject of rules and working conditions, some of which the Circuit Court of Appeals declares "*materially affect wages,*" in which statement the court is supported by Labor Board Decision No. 2 (Pr. Rec., 48), and again by its Decision 119 (Pr. Rec., 71), where the Board say that:

"There are in the dispute as presented questions involving rules and working conditions, some of which are interwoven with and materially affect earnings and wages."

Appellant contends that said title does not confer power upon the Board to nullify contracts covering rules and working conditions, some of which materially affect the wages of employees (Pr. Rec., 174), entered into by the parties, which are in full force, and which are satisfactory to both the carrier and its employees. If it does confer such power appellant contends that the act is unconstitutional and void. If it does not confer such power appellant does not complain against its constitutionality. If some of the rules and working conditions "materially affect wages," to that extent contracts covering rules and working conditions cover wages as well. To invalidate such contracts is to interfere with the private right of contract, concerning which Judge Pitney said in his dissenting opinion in *Wilson v. New*, 243 U. S. 332, 61 L. Ed. 755:

"This act in my judgment usurps the right of the owners of the railroads to manage their own properties and is an attempt to control and manage the properties rather than to regulate their use in commerce. In particular it deprives the carriers of their right to agree with their employees as to the terms of employment. Without amplifying the point I need only refer again to *Adair v. United States*, 208 U. S. 161, 52 L. Ed. 436."

The Circuit Court of Appeals holds that said title confers power upon the Board to set aside contracts covering rules and working conditions, some of which "materially affect wages," under a discretion arising out of and under the act. Therefore the court is in error in saying:

"there is not here involved any proceeding for the enforcement on the carrier of a decision of the Board as to wages or working conditions."

What the court here says is *not* involved is the particular thing which is involved—the enforcement upon

not only the carrier, but upon the employees as well, of a decision of the Board invalidating agreements covering rules and working conditions "materially" affecting "wages." The Circuit Court of Appeals thereupon says that when the Board undertakes to enforce upon the carrier a decision as to rules or working conditions "it will be time enough to interpose the defense of unconstitutionality to any undertaking to enforce the decision as one binding and conclusive on the parties." Decision No. 218 was such a decision and the right to enforce it was the question pending in the Circuit Court of Appeals—a decision declaring satisfactory contracts covering rules and working conditions, "materially affecting wages," null and void. The constitutional question was therefore before the court under the exact conditions which the court held would make the question pertinent.

The foregoing quotation from Justice Pitney, dissenting in *Wilson v. New*, embodies the law. The principal opinion by Chief Justice White recognizes the law to be as announced by Justice Pitney with the qualification that where a general strike of railway employees has been ordered, Congress has the inherent power to standardize wages for a limited time to be fixed by the act, during which term carriers and employees may agree upon wages and by doing so suspend the operation of the law, even before it expires by its own limitation.

The following is quoted from the opinion of Chief Justice White in *Wilson v. New, supra* (the italics being ours):

"It is also equally true that as the right to fix by agreement between the carrier and its employees a *standard of wages* to control their relations is *primarily private*, the establishment and giving effect to such agreed on *standard* is *not subject to be controlled or prevented by public authority*. But taking all these propositions as undoubted, if the sit-

uation which we have described and with which the act of Congress dealt be taken into view—that is, the dispute between the employers and the employees as to a *standard of wages*, their failure to agree, the resulting absence of such *standard*, the *entire interruption of interstate commerce which was threatened*, and the infinite injury to the public interest which was imminent—it would seem inevitably to result that the power to regulate necessarily obtained and was subject to be applied to the extent necessary to provide a remedy for the situation, which included the power to deal with the dispute, to provide by appropriate action for a *standard of wages* to fill the want of one caused by the failure to exert the private right on the subject and to give effect by appropriate legislation to the regulations thus adopted."

Herein Chief Justice White declares an inherent power in Congress to temporarily standardize wages as a necessity when carriers and employees cannot agree and when because of the absence of such *standard*, an *entire interruption of interstate commerce is threatened* and infinite injury to the public interest is imminent.

Again Chief Justice White said (the italics being ours):

"But this was not a *permanent fixing*, but, in the nature of things, a *temporary one* which left the will of the employers and employees to control *at the end of the period* if their dispute had then ceased."

Wilson v. New, 243 U. S. 332, 61 L. Ed. 755, cited by Judge Page, does not sustain the constitutionality of the sections of Title III here involved. On the contrary *Wilson v. New* is conclusive that Congress itself is not vested with inherent power to do what Section 307 of said Title undertakes to confer power upon the Labor Board to do. That the decision of the court as to the constitutionality of the Adamson Act was an emergency decision is apparent,

not only from the language of the Adamson Act, but from the decisions of the courts which uphold the act as an emergency act, made necessary by the *general strike* of railroad employees *called throughout the United States* looking to a suspension of all commerce. The inherent power which the court asserts inheres in Congress to standardize wages is confined to emergencies such as faced the country when the Adamson Act was enacted, covering what Chief Justice White designates as an *interregnum* during which wages might be standardized by act of Congress *for such reasonable time* as might be regarded sufficient to enable the carrier and employees to agree as to wages and working conditions. Power to standardize wages for all time, or except in cases of emergency similar to that which existed when the Adamson Act was passed, was not declared in *Wilson v. New*. Upon the contrary the opinion upholds the Adamson Act on the doctrine of necessity, and confines Congress in passing such acts to emergencies like unto that which then existed, and then only for such period of time as Congress might think necessary to enable normal conditions to return, which period Chief Justice White designates as an "interregnum." In Section 307 of said title power is professedly conferred upon the Labor Board to prescribe wages, rules and working conditions on an *ex parte* submission by either carrier or employee, not temporarily, but without any limitation. Thus Congress has assumed to confer upon the Labor Board power which under *Wilson v. New*, Congress itself does not possess.

In his opinion in *Wilson v. New*, Chief Justice White considers and determines the power of Congress to deal with the subjects embraced in the Adamson Act.

In the opening paragraph he says that the question involved is a question of power in Congress *under the*

circumstances existing to deal with the hours of work and wages of railroad employees engaged in interstate commerce.

Again he says, the italics being ours:

“Did Congress have power, under the circumstances stated, that is, in dealing with the dispute between the employers and employees as to wages, to provide *a permanent eight-hour standard* and to create by legislative action a *standard of wages* to be operative upon the employer and employees *for such reasonable time as it deemed necessary to afford an opportunity for the meeting of the minds of employers and employees on the subject of wages?* Or, in other words, did it have the power in order to prevent the interruption of interstate commerce to exert its will to supply the absence of a wage scale resulting from the disagreement as to wages between the employers and employees and to make its will on that subject controlling *for the limited period provided for?*”

Again the opinion says (351), the italics being ours:

“And finally to what derision would it not reduce the proposition that government had power to enforce the duty of operation if that power did not extend to doing that which was essential to prevent operation from being *completely stopped* by filling the *interregnum* created by an absence of a conventional *standard of wages* because of a dispute on that subject between the employers and employees by a *legislative standard* binding on employees and employers *for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties.*

We are of opinion that the reasons stated conclusively establish that from the point of view of inherent power the act which is before us was clearly within the legislative power of Congress to adopt and that in substance and effect it amounted to an exertion of its authority under the circumstances disclosed to compulsorily arbitrate the dispute between

the parties by establishing as to the subject matter of that dispute a legislative *standard of wages*.
 • • • ”

As to the permanency of the standard of wages established the opinion says (p. 356) :

“But this was not a permanent fixing, but, in the nature of things, a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased.”

Again as to the permanency of the standard of wages fixed by the law the opinion says, the italics being ours:

“It certainly cannot be said that the act took away from the parties, employers and employees, their *private right to contract* on the subject of a scale of wages, since the power which the act exerted was *only exercised because of the failure of the parties to agree* and the resulting necessity for the lawmaking will to supply the *standard* rendered necessary by such failure of the parties to exercise their private right.”

Again on the subject of the permanency of the standard of wages the opinion says, the italics being ours:

“From this it also follows that there is no foundation for the proposition that *arbitrary action* in total disregard of the private rights concerned was taken, because the right to *change or lower the wages* was left to be provided for by agreement between the parties after a *reasonable period which the statute fixed*. This must be unless it can be said that to afford an opportunity for the exertion of the private right by agreement as to the *standard of wages* was in conflict with such right.”

Concluding, the opinion upholds the power of Congress to adopt the act in question whether it be viewed as a direct fixing of wages to meet the absence of a *standard on that subject* resulting from the dispute between the parties or as the exertion by Congress of the “power which it undoubtedly possessed to provide by appro-

priate legislation for compulsory arbitration, a power which inevitably resulted from its authority to protect interstate commerce in dealing with a situation like that which was before it."

The opinion in *Wilson v. New* was adopted by a 5 to 4 vote. Five justices declared that Congress had power to fix a *temporary* standard of wages during the period provided for by the Adamson Act. Four justices declared that Congress could not take from the parties the right to contract and compel them to submit to a standard of wages prescribed by Congressional enactment.

It is important in analyzing Chief Justice White's opinion to note that he says concerning the standard of wages fixed by the Adamson Act (pp. 356-357), the italics being ours:

"But this was not a permanent fixing, but, in the nature of things, a temporary one which left the will of the employers and employees to control at the end of the period if their dispute had then ceased."

And again he says (p. 351) that the Government has power to prescribe a standard of wages to fill the *interregnum* created by an absence of a conventional standard of wages because of a dispute on that subject between the employers and the employees, by a legislative standard binding on employers and employees *for such time as the legislature might deem reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties.*

It follows from the foregoing quotations that the court in upholding the standard of wages fixed by the Adamson Act did so because of an alleged inherent power to *temporarily fix a standard during*

"the interregnum created by an absence of a con-

ventional standard of wages because of a dispute on that subject between the employers and employees by a legislative standard binding on employers and employees for such a time as might be deemed by the legislature reasonably adequate to enable normal conditions to come about as the result of agreements as to wages between the parties."

While declaring an inherent power in Congress to so provide for such an interregnum the opinion also declares that it is

"true that as the right to fix by agreement between the carrier and its employees a standard of wages to control their relations is primarily private, the establishment and giving effect to such agreed on standard is not subject to be controlled or prevented by public authority."

The opinion recognizes the private right under all circumstances to contract and agree even during the period of time for which the legislature has prescribed a standard of wages, and only recognizes an inherent power in Congress to fix a standard of wages for such limited period of time as is considered by the legislature sufficient to enable the re-establishment of normal conditions and standards of wages by such private contract.

The court holds:

1. That where a general strike of railway employees has been ordered by reason of a failure to agree upon a standard of wages, Congress may fix a standard working day for employees engaged in interstate commerce.
2. Under such circumstances Congress may establish a *temporary standard of wages as was done by the Adamson Act.*

The conclusions reached in the opinion rest entirely upon emergency.

Justice Holmes concurred in the opinion and subsequently wrote the opinion in *Ft. Smith & Western Rail-*

road Company et al. v. Mills, Receiver, etc. 253 U. S. 206, 64 L. Ed. 862, which was a suit to enjoin the receiver of the Ft. Smith & Western Railroad Company from conforming to the Adamson Act in respect of hours of service and wages and to enjoin the Federal district attorney from proceeding to enforce that act. An injunction was awarded. Concerning the Adamson Act, Justice Holmes said, the italics being ours:

“The act in question known as the Adamson Law was passed to meet the *emergency created by the threat of a general railroad strike.*”

Justice Holmes also said, concerning the Adamson Act, the italics being ours:

“But the statute *avowedly was enacted in haste to meet an emergency and the general language necessary to satisfy the demands of the men need not be taken to go further than the emergency required.* * * *”

The foregoing extracts from the opinion in *Wilson v. New*, declaring the inherent power to temporarily fix a standard of wages to apply during an *interregnum*, recognize the act to be an *interference with private rights and the decision does not, as Justice Holmes says, extend beyond the purpose of the enactment.*

The opinion in *Wilson v. New*, upholding the constitutionality of the Adamson Act, is conclusive of the unconstitutionality of certain sections of Title III of the Transportation Act. Title III provides a Board to which carrier and employee are *ordered to submit* matters contemplated by the act, not otherwise determined, *for decision.* This includes disputes involving grievances growing out of the administration of rules, working conditions, and wages and authorizes the Board to standardize wages, to decide all disputes as to rules and working conditions, and to settle any and all disputes

involving grievances growing out of the administration of rules and working conditions without regard to threatened commercial interruptions. *Wilson v. New* only recognizes an inherent power to *standardize wages during an interregnum*, to prevent the cessation of all interstate commerce and for no other purpose. When the power of Congress to pass the Adamson Act was being considered, the power was upheld as a mere temporary expedient. If Congress has inherent power to standardize wages *temporarily* only it cannot *delegate* power to a board to standardize wages *permanently*. If Congress has inherent power to temporarily standardize wages, even if it can delegate an inherent power, it cannot delegate a greater power than it can exercise, which the court confines to a standardization of wages during an interregnum.

Section 307 (a) and (b) provides that the Labor Board may take jurisdiction of and with due diligence decide any dispute involving grievances, rules, working conditions or wages which has not been decided as provided in Section 301 if the Board is of the opinion that the dispute is *likely substantially to interrupt commerce*.

In his opinion Chief Justice White says that the Adamson Act was passed to *save the country from commercial disaster, property injury, and the personal suffering of all, not to say starvation*. Title III professes to confer power upon the Board upon *its own motion* to *fix wages, rules and working conditions* if *in its opinion the dispute is likely substantially to interrupt commerce*.

The power of Congress to adopt a temporary standard of wages is held to be an inherent power and the inherent power to adopt said standard is limited to an interregnum during which carrier and employee may

adjust their differences. This inherent power is a limitation upon Congress. Congress cannot pass an act prescribing a standard of wages which shall apply to the exclusion of agreements of the parties. Even while a standard provided by Congress is in effect the parties may by agreement ignore the standard so prescribed and conduct their relations under contracts entered into by the parties. Notwithstanding the power to so standardize wages inheres in Congress and cannot therefore be delegated, Congress nevertheless by Title III has undertaken to confer upon a board powers which Congress does not possess, namely, power to take the question of grievances, rules, working conditions and wages out of the hands of the parties at the request of either carrier or employee and pass the same up to a commission of nine men to decide. Thus Title III authorizes a board to fix rules, working conditions and wages, not temporarily but permanently, a power which, under the opinion in *Wilson v. New*, Congress itself does not possess.

In his dissenting opinion in *Wilson v. New*, Justice Day said concerning the Adamson Act:

“Such legislation it seems to me amounts to the taking of the property of one and giving it to another in violation of the spirit of fair play and equal rights which the Constitution intended to secure in the due process clause to all coming within its protection and is a striking illustration of that method which has always been deemed to be the plainest illustration of arbitrary action, the taking of the property of A and giving it to B by legislative fiat.”

It is apparent that said title violates the spirit of fair play and private rights under the due process clause of the Federal Constitution, usurps the right of the railroads to manage their own property and deprives the

carrier of its right to agree with its employees as to the terms and conditions of their employment. Said title of the Transportation Act is not justified by anything said in *Wilson v. New*, but is condemned by the logic, reasoning and the language of said opinion and goes beyond any power which is there inherently declared to exist in Congress.

It is insisted that the decree of the District Court perpetually enjoining the Labor Board, and the members thereof, from assuming any authority, or taking any action of any kind or character under Section 301 of the Transportation Act, "unless and until" there has been a joint submission to the Board of a dispute by the carrier and employees, and from making publication of any matter based upon action taken by the Board under said Section 301, without a joint submission thereof having been made to the Board as required by said section, should be affirmed. To sustain the reversal of said decree would be to approve the usurpations which gave rise to this suit and to declare that the sections of Title III of the Transportation Act, here involved, are constitutional.

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In the Supreme Court of the United States.

OCTOBER TERM, 1922.

THE PENNSYLVANIA RAILROAD COMPANY,
petitioner,

v.

UNITED STATES RAILROAD LABOR BOARD, No. 585.
R. M. Barton, G. W. W. Hanger, Ben W.
Hooper, A. O. Wharton, W. L. McMen-
men, Horace Baker, J. H. Elliott, Albert
Phillips, Samuel Higgins, respondents.

*PETITION OF APPELLANT FOR A WRIT OF CERTIORARI
TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH
CIRCUIT.*

SUGGESTIONS ON BEHALF OF THE UNITED STATES RAILROAD LABOR BOARD.

The appeal is from the final order or decree of the United States Circuit Court of Appeals which reversed the final decree of the District Court and remanded the cause with directions to dismiss the bill. On Monday, November 13, 1922, counsel for appellant presented a petition for a writ of certiorari, and leave was given appellees to answer within five days.

No. 585

OCTOBER TERM, 1922

Office Supreme Court, U. S.

FILED

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CLERK

IN THE

Supreme Court of the United States, ~~of~~ PITTSBURGH

THE PENNSYLVANIA RAILROAD COMPANY, Appellant

vs.

UNITED STATES RAILROAD LABOR BOARD, R. M. BARTON, G. W. W. HANGER, BEN W. HOOPER, A. O. WHARTON, W. L. McMENIMEN, HORACE BAKER, J. H. ELLIOTT, ALBERT PHILLIPS, SAMUEL HIGGINS, Appellees

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

SUGGESTIONS OF THE PENNSYLVANIA RAILROAD COMPANY
ON THE MOTION OF THE UNITED STATES RAILROAD
LABOR BOARD TO ADVANCE

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IN THE
Supreme Court of the United States

OCTOBER TERM, 1922. No. 585

The Pennsylvania Railroad Company, Appellant

vs.

United States Railroad Labor Board, R. M. Barton, G. W. W. Hanger, Ben W. Hooper, A. O. Wharton, W. L. McMenimen, Horace Baker, J. H. Elliott, Albert Phillips, Samuel Higgins, Appellees

APPEAL FROM THE UNITED STATES CIRCUIT COURT OF
APPEALS FOR THE SEVENTH CIRCUIT

SUGGESTIONS OF THE PENNSYLVANIA RAIL-
ROAD COMPANY ON THE MOTION OF THE
UNITED STATES RAILROAD LABOR BOARD
TO ADVANCE

Sections 301 and 307 of Title III of the Transportation Act of 1920 confer upon the United States Railroad Labor Board all the powers that body may exercise as to disputes between carriers and their employes.

The Pennsylvania Railroad Company construes the decree of the District Court to perpetually enjoin the United States Railroad Labor Board and its members from assuming any authority or taking any action of any kind or character *under Section 301* of said title *unless and until* there has been a *joint submission* of the dispute by the carrier and employes which has been the subject matter of conference between them and from making publication of any matter based upon any action taken by the Board which did not result from such *joint submission*.

The Pennsylvania Railroad Company does not construe said decree as enjoining the Board from taking jurisdiction of disputes involving grievances, rules, working conditions, wages, salaries of employes or subordinate officials of carriers, either upon its own motion, if it is of the opinion that the dispute is one which is likely to substantially interrupt commerce, or upon an *ex parte* submission by the chief executive of any carrier, or organization of employes, or subordinate officials, whose members are directly interested in the dispute.

Said company construes *Section 301* to contemplate joint submission of disputes by the parties to voluntary arbitration and that no *ex parte* submission of a dispute can be made under *Section 301*.

It agrees that *under Section 307* either party may confer jurisdiction upon the Board to hear and decide a dispute on an *ex parte* submission of any question contemplated thereby.

If jurisdiction of any dispute can be conferred upon the Board by *ex parte* submission *under Section 301* *Section 307* subserves no purpose.

The Pennsylvania Railroad Company agrees that its employes may make *ex parte* submissions *under Section 307* and that the right to make such submission is not foreclosed by the decree of injunction entered in the District Court.

The injunction does not therefore prevent The Pennsylvania Railroad Company and its employes, of any class,

from invoking the jurisdiction of the Board as to disputes which are *jointly submitted* for determination and decision *under Section 301* or by *ex parte submission under Section 307*.

The Government in its motion to advance represents that "the Government maintains that (1) the Railroad Labor Board is not suable as here undertaken; and (2) if suable the Board acted entirely within its jurisdiction and authority, and its decision should stand."

If the Railroad Labor Board acted within its jurisdiction and authority The Pennsylvania Railroad Company does not contend that it is suable. It was because it acted herein without power and authority that this bill was filed.

Inasmuch as The Pennsylvania Railroad Company and its employes may jointly appeal to the Board to settle disputes under Section 301, or by *ex parte* submissions under Section 307, notwithstanding said injunction, it does not appear that any public interest requires the advancement of the above-entitled cause for hearing.

While *de hors* the record, it may be stated as a matter of common knowledge and interest that since the decision of the District Court the members of System Federation 90 (American Federation of Labor) on the Pennsylvania System joined the general strike and are no longer employes of the Pennsylvania. The places of these men were filled and the Pennsylvania is operating more than 100 per cent. of employes over the number employed on the date of the strike, all being represented by committees elected under the Company's plan of employe representation.

The Labor Board's decision ordered a conference with and recognition of System Federation 90. Under present conditions this order could not be complied with, as this organization is no longer representative of the Pennsylvania's shop craft employes, or any of them. This case is, therefore, to that extent practically moot, and no public or private interests are at stake. Aside from this situation, the Circuit Court of Appeals in reversing the Dis-

trict Court said, "True it is, that if the employes select as their representatives System Federation No. 90, or some other organization, the carrier may decline to confer."

The operating conditions on the Pennsylvania are normal, but its loyal present employes are still being subjected to the pressure, persuasion and intimidation which necessitated the Government's injunction suit in the United States District Court at Chicago, and a hearing of this cause out of its usual order would only serve to increase the activities and propaganda of the organization which has lost its standing on the Pennsylvania and would tend to cause uneasiness and uncertainty in the ranks of the loyal employes, to the consequent demoralization of the service and injury to the public welfare.

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Statement of the Case.

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PENNSYLVANIA RAILROAD COMPANY v. UNITED STATES RAILROAD LABOR BOARD ET AL.

APPEAL FROM AND CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

No. 585. Argued January 11, 1923.—Decided February 19, 1923.

1. Under Title III, § 307, of the Transportation Act, 1920, the Railroad Labor Board has jurisdiction to hear and decide a dispute over rules and working conditions upon the application of either side, when the parties have failed to agree upon a settlement under § 301 and no adjustment board has been organized under § 302. P. 80.
2. In authorizing such application by any "organization of employees . . . directly interested in the dispute," (§ 307), the act includes labor unions. P. 81.
3. The Board has jurisdiction to decide who may represent employees in conferences under § 301 or in applying for hearings under § 307, and to make reasonable rules in advance for ascertaining the will of the employees in this regard. § 308. P. 82.
4. The Board was created, not as a tribunal to determine the legal rights and obligations of railway employers and employees, or to protect and enforce these, but to decide how such rights ought to be exercised for coöperation in running a railroad; its decisions have no other sanction than that of public opinion. P. 84.
5. The making of decisions and publication of violations in accordance with the procedure and within the discretion defined by the statute, cannot be enjoined by the courts. *Id.*
282 Fed. 701, affirmed.

This case involves the construction of Title III of the Transportation Act of 1920, c. 91, 41 Stat. 456, 469. The Title provides for the settlement of disputes between railroad companies engaged in interstate commerce and their employees, and as a means of securing this, it creates a Railroad Labor Board and defines its functions and powers.

The Pennsylvania Railroad Company began this action by a bill in equity against the Railroad Labor Board and its individual members in the District Court for the

Northern District of Illinois, where the Board has its office, averring that the suit involved more than \$3,000, and praying an injunction against the defendants' alleged unlawful proceedings under the act and especially against their threatened official publication under § 313 of the Title that the Railroad Company had violated the Board's decision under the act.

The defendants moved to dismiss the bill on the ground that the suit was one against the United States without its consent, and also for want of equity and a lack of a cause of action. They also filed an answer making the same objections to the bill as in the motion and setting forth by exhibits more in detail the proceedings before the Board and its decisions. The District Court heard the case on the bill, motion and answer, and granted the injunction as prayed. The Board appealed to the Circuit Court of Appeals, which reversed the decree and directed the dismissal of the bill. The decree of the Circuit Court of Appeals, not being made final by the statutes, the case is brought here by appeal under § 241 of the Judicial Code.

On December 28, 1917, the President, by authority of the Act of Congress of August 29, 1916, c. 418, 39 Stat. 619, 645, took over the railroads of the country, including that of the complainant, and operated them through the Director General of Railroads until March 1, 1920, when, pursuant to the Transportation Act of 1920, possession of them was restored to the companies owning them. During his operation, the Director General had increased wages and established the rules and working conditions by what were called National Agreements with National Labor Unions composed of men engaged in the various railroad crafts. Further demands by employees through such unions were presented to the Director General and were pending and undetermined when the Transportation Act was approved. Conferences were held between the

heads of the labor unions, signatories to the National Agreement, and representatives of the railroads after the railroads were restored to private ownership, but without successful issue. When the members of the Labor Board were appointed and organized, April 15, 1920, it assumed jurisdiction of these demands and proceeded to deal with them. It rendered its decision as to the wage dispute on July 20, 1920, and postponed that as to rules and working conditions until April 14, 1921, when it decided that such rules and working conditions as were fixed in the so-called National Agreements under the Director General and had been continued by the Board as a *modus vivendi* should end July 1, 1921, and remanded the matter to the individual carriers and their respective employees, calling upon them in the case of each railroad to designate representatives to confer and decide so far as possible respecting rules and working conditions for the operation of such railroad and to keep the Board advised of the progress toward agreement. The Board accompanied this decision (No. 119) with a statement of principles or rules of decision which it intended to follow in consideration and settlement of disputes between the carriers and employees. The only two here important are §§ 5 and 15, as follows:

"5. The right of such lawful organization to act toward lawful objects through representatives of its own choice, whether employees of a particular carrier or otherwise, shall be agreed to by management."

"15. The majority of any craft or class of employees shall have the right to determine what organization shall represent members of such craft or class. Such organization shall have the right to make an agreement which shall apply to all employees in such craft or class. No such agreement shall infringe, however, upon the right of employees not members of the organization representing the majority to present grievances either in person or by representatives of their own choice."

On June 27, 1921, the Board announced that some carriers in conference with their employees had agreed upon rules and working conditions and others had not. As to the latter the Board continued the old rules and working conditions until it should render a decision as to them.

In May, 1921, the officers of the Federation of Shop Crafts of the Pennsylvania System, a labor union of employees of that System engaged in shop work, and affiliated with the American Federation of Labor, met the representatives of the Pennsylvania Railroad Company. They said they represented a majority of the employees of the Pennsylvania System in those crafts and were prepared to confer and agree upon rules and working conditions. The Pennsylvania representatives refused to confer with the Federation for lack of proof that it did represent such a majority, and said they would send out a form of ballot to their employees asking them to designate thereon their representatives. The Federation officers objected to this ballot because it was not in accordance with Principles 5 and 15 of the Board in that it made no provision for representation of employees by an organization, but specified that those selected must be natural persons, and such only as were employees of the Pennsylvania Company, and also because it required that the representatives of the employees should be selected regionally rather than from the whole system. The result was that the Company and the Federation each sent out ballots. The Federation then filed a complaint under § 307 of the Transportation Act, against the Pennsylvania Company, complaining on behalf of its members directly interested of the Company's course in respect of the ballots. The Company appeared, a hearing was had and the Board decided (Decision No. 218) that neither of the ballots sent out by the parties was proper, that representatives so chosen were not proper representatives and that rules and work-

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ing conditions agreed upon by them would be void. It further appeared that the votes cast on the Company's ballots were something more than 3,000 out of more than 33,000 employees entitled to vote. The Federation had advised its members not to vote on the Company's ballots. What the result was in the vote of the Federation ballots did not appear. The persons chosen by the 3,000 votes on the Company's ballots conferred with the Pennsylvania Company's representatives and agreed upon rules and working conditions. The Board in its decision ordered a new election for which rules were prescribed and a form of ballot was specified, on which labor organizations as well as individuals could be voted for as representatives at the option of the employee.

The Company on September 16, 1921, applied to the Board to vacate this decision on the ground that there was no dispute before the Board of which by Title III of the Transportation Act the Board was given jurisdiction. After a hearing the Board declined to vacate its order but said that it would allow the Company to be heard on the question of the ratification of its shop craft rules by representatives of the crafts concerned when fairly selected.

Title III of the Transportation Act of 1920 bears the heading "Disputes Between Carriers And Their Employees And Subordinate Officials."

Section 301 makes it the duty of carriers, their officers, employees and subordinate officials, to exert every reasonable effort to avoid interruption to the operation of an interstate commerce carrier due to a dispute between the carrier and its employees, and further provides that such disputes shall be considered and if possible decided "in conference between representatives designated and authorized so to confer by the carriers, or the employees or subordinate officials thereof, directly interested in the dispute."

The section concludes:

"If any dispute is not decided in such conference, it shall be referred by the parties thereto to the board which under the provisions of this title is authorized to hear and decide such dispute."

Section 302 provides for the establishment of railroad boards of adjustment by agreement between any carrier, group of carriers, or the carriers as a whole, and any employees or subordinate officials of carriers, or organization or group of organizations thereof. No such boards of adjustment were established when this controversy arose.

Section 303 provides for hearing and decision by such boards of adjustment upon petition of any dispute involving only grievances, rules or working conditions not decided as provided in § 301.

Sections 304, 305 and 306 provide for the appointment and organization of the "Railroad Labor Board" composed of nine members, three from the Labor Group, three from the Carrier Group, and three from the Public Group.

Section 307 (a) provides that when a labor adjustment board under § 303 has not reached a decision of a dispute involving grievances, rules or working conditions in a reasonable time, or when the appropriate adjustment board has not been organized under § 302, the Railroad Labor Board "(1) upon the application of the chief executive of any carrier or organization of employees or subordinate officials whose members are directly interested in the dispute, (2) upon a written petition signed by not less than 100 unorganized employees or subordinate officials directly interested in the dispute, or (3) upon the Labor Board's own motion if it is of the opinion that the dispute is likely substantially to interrupt commerce, shall receive for hearing, and as soon as practicable and with due diligence decide, any dispute involving grievances, rules, or

working conditions which is not decided as provided in section 301."

Paragraph (b) of the same section provides for a hearing and decision of disputes over wages.

Paragraph (c) makes necessary to a decision of the Board the concurrence of five members, of whom, in the case of wage disputes, a member of the Public Group must be one. The paragraph further provides that

"All decisions of the Labor Board shall be entered upon the records of the board and copies thereof, together with such statement of facts bearing thereon as the board may deem proper, shall be immediately communicated to the parties to the dispute, the President, each Adjustment Board, and the [Interstate Commerce] Commission, and shall be given further publicity in such manner as the Labor Board may determine."

Paragraph (d) requires that decisions of the Board shall establish standards of working conditions which in the opinion of the Board are just and reasonable.

Section 308 prescribes other duties and powers of the Labor Board, among which is that of making "regulations necessary for the efficient execution of the functions vested in it by this title."

Section 309 prescribes that

"Any party to any dispute to be considered by an Adjustment Board or by the Labor Board shall be entitled to a hearing either in person or by counsel."

Section 313 is as follows:

"The Labor Board, in case it has reason to believe that any decision of the Labor Board or of an Adjustment Board is violated by any carrier, or employee or subordinate official, or organization thereof, may upon its own motion after due notice and hearing to all persons directly interested in such violation, determine whether in its opinion such violation has occurred and make public its decision in such manner as it may determine."

Mr. Frederic D. McKenney, with whom *Mr. Frank J. Loesch*, *Mr. Timothy J. Scofield*, *Mr. Charles F. Loesch*, *Mr. Robert W. Richards*, *Mr. C. B. Heiserman* and *Mr. E. H. Seneff* were on the brief, for appellant and petitioner.

Mr. Blackburn Esterline, Assistant to the Solicitor General, with whom *Mr. Attorney General Daugherty* and *Mr. Solicitor General Beck* were on the brief, for appellees and respondents.

MR. CHIEF JUSTICE TAFT, after stating the case as above, delivered the opinion of the Court.

It is evident from a review of Title III of the Transportation Act of 1920 that Congress deems it of the highest public interest to prevent the interruption of interstate commerce by labor disputes and strikes, and that its plan is to encourage settlement without strikes, first by conference between the parties; failing that, by reference to adjustment boards of the parties' own choosing, and if this is ineffective, by a full hearing before a National Board appointed by the President, upon which are an equal number of representatives of the Carrier Group, the Labor Group, and the Public. The decisions of the Labor Board are not to be enforced by process. The only sanction of its decision is to be the force of public opinion invoked by the fairness of a full hearing, the intrinsic justice of the conclusion, strengthened by the official prestige of the Board, and the full publication of the violation of such decision by any party to the proceeding. The evident thought of Congress in these provisions is that the economic interest of every member of the Public in the undisturbed flow of interstate commerce and the acute inconvenience to which all must be subjected by an interruption caused by a serious and widespread labor dispute, fastens public attention closely on all the circumstances

of the controversy and arouses public criticism of the side thought to be at fault. The function of the Labor Board is to direct that public criticism against the party who, it thinks, justly deserves it.

The main and controlling question in this case is, whether the members of the Board exceeded their powers on the facts as disclosed in the bill and answer.

It is contended by the carrier that the Labor Board can not obtain jurisdiction to hear and decide a dispute until it is referred by the parties to the Board after they have conferred and failed to agree under § 301. Undoubtedly the act requires a serious effort by the carrier and his employees to adjust their differences as the first step in settling a dispute but the subsequent sections dispel the idea that the jurisdiction of the Board to function in respect to the dispute is dependent on a joint submission of the dispute to it. If adjustment boards are not agreed upon, then under § 307, either side is given an opportunity to bring its complaint before the Labor Board, which then is to summon everyone having an interest, and after a full hearing is to render a decision. A dispute existed between all the carriers and the officers of the National Labor Unions as to rules and working conditions in the operation of the railroads. By order of the Labor Board, this dispute, which had arisen before the passage of the Transportation Act and before the Government had turned back the railroads to their owners, was continued for settlement before the Labor Board. That Board had been obliged to postpone the decision of the controversy until it could give it full hearing and meantime had ordered that the existing rules and conditions should be maintained as a *modus vivendi*.

Counsel of the Railroad Company insist that the Board had no jurisdiction to make an order or to take up the controversies between the Government Railroad Administration and the National Labor Unions; that when the rail-

roads were turned back to their owners each company had the right to make its own rules and conditions and to deal with its own employees under § 301, and that the jurisdiction of the Board did not attach until a dispute as to such rules and conditions between the company and its employees had thereafter arisen.

We are not called upon to pass upon the propriety or legality of what the Labor Board did in continuing the existing rules and labor conditions which had come over from the Railroad Administration, or in hearing an argument as to their amendment by its decision. It suffices for our decision that the Labor Board at the instance of the carriers finally referred the whole question of rules and labor conditions to each company and its employees to be settled by conference under § 301; that such conferences were attempted in this case, and that thereafter the matter was brought before the Board by Federation No. 90 of Shop Crafts of the Pennsylvania System under § 307. It is the alleged invalidity of this proceeding, thus initiated, which is really the basis of the bill of complaint of the Company herein, and it is this only which we need consider.

First, Did Federation No. 90 have the right under § 307 to institute the hearing of the dispute? Section 307 says that this may be invoked on the application of the chief executive of any organization of employees whose members are directly interested in the dispute. Its name indicates, and the record shows, that the Federation is an association of employees of the Pennsylvania Company directly interested in the dispute. The only question between the Company and the Federation is whether the membership of the latter includes a majority of the Company's employees who are interested. But it is said that the Federation is a labor union affiliated with the American Federation of Labor and that the phrase "organiza-

tion of employees" used in the act was not intended by Congress to include labor unions. We find nothing in the act to impose any such limitation if the organization in other respects fulfills the description of the act. Congress has frequently recognized the legality of labor unions, *United Mine Workers v. Coronado Coal Co.*, 259 U. S. 344, and no reason suggests itself why such an association, if its membership is properly inclusive, may not be regarded as among the organizations of employees referred to in this legislation.

The next objection made by the Company to the jurisdiction of the Board to entertain the proceeding initiated by the Federation is that it did not involve the kind of dispute of which the Board could take cognizance under the act. The result of the conferences between the Pennsylvania Railroad Company and its employees under § 301 appears in the statement of the case. By a vote of 3,000 out of more than 30,000 employees, a representative committee was appointed with which the officers of the Company made an agreement as to rules and working conditions. Federation No. 90 for its members objected to the settlement on the ground that it had not been made by properly chosen representatives of the employees and brought this dispute before the Labor Board. The Pennsylvania Company was summoned and appeared before the Board and the issue was heard.

It is urged that the question who may represent the employees as to grievances, rules and working conditions under § 301 is not within the jurisdiction of the Labor Board to decide; that these representatives must be determined before the conferences are held under that section; that the jurisdiction of the Labor Board does not begin until after these conferences are held, and that the representatives who can make application under § 307 to the Board are representatives engaged in the conference under § 301. Such a construction would give either side

an easy opportunity to defeat the operation of the act and to prevent the Labor Board from considering any dispute. It would tend to make the act unworkable. If the Board has jurisdiction to hear representatives of the employees, it must of necessity have the power to determine who are proper representatives of the employees. That is a condition precedent to its effective exercise of jurisdiction at all. One of its specific powers conferred by § 308 is to "make regulations necessary for the efficient execution of the functions vested in it by this title." This must include the authority to determine who are proper representatives of the employees and to make reasonable rules for ascertaining the will of the employees in the matter.

Again, we think that this question of who may be representatives of employees, not only before the Board, but in the conferences and elsewhere is and always has been one of the most important of the rules and working conditions in the operation of a railroad. The purpose of Congress to promote harmonious relations between the managers of railways and their employees is seen in every section of this act, and the importance attached by Congress to conferences between them for this purpose is equally obvious. Congress must have intended, therefore, to include the procedure for determining representatives of employees as a proper subject matter of dispute to be considered by the Board under § 307. The act is to be liberally construed to effect the manifest effort of Congress to compose differences between railroad companies and their employees, and it would not help this effort, to exclude from the lawful consideration of the Labor Board a question which has so often seriously affected the relations between the companies and their employees in the past and is often encountered on the very threshold of controversies between them.

The second objection is that the Labor Board in Decision 119 and Principles 5 and 15, and in Decision 218,

compels the Railroad Company to recognize labor unions as factors in the conduct of its business. The counsel for the Company insist that the right to deal with individual representatives of its employees as to rules and working conditions is an inherent right which can not be constitutionally taken from it. The employees, or at least those who are members of the labor unions, contend that they have a lawful right to select their own representatives, and that it is not within the right of the Company to restrict them in their selection to employees of the Company or to forbid selection of officers of their labor unions qualified to deal with and protect their interests. This statute certainly does not deprive either side of the rights claimed.

But Title III was not enacted to provide a tribunal to determine what were the legal rights and obligations of railway employers and employees or to enforce or protect them. Courts can do that. The Labor Board was created to decide how the parties ought to exercise their legal rights so as to enable them to coöperate in running the railroad. It was to reach a fair compromise between the parties without regard to the legal rights upon which each side might insist in a court of law. The Board is to act as a Board of Arbitration. It is to give expression to its view of the moral obligation of each side as members of society to agree upon a basis for coöperation in the work of running the railroad in the public interest. The only limitation upon the Board's decisions is that they should establish a standard of conditions, which, in its opinion, is just and reasonable. The jurisdiction of the Board to direct the parties to do what it deems they should do is not to be limited by their constitutional or legal right to refuse to do it. Under the act there is no constraint upon them to do what the Board decides they should do except the moral constraint, already mentioned, of publication of its decision.

It is not for this or any other court to pass upon the correctness of the conclusion of the Labor Board if it keeps within the jurisdiction thus assigned to it by the statute. The statute does not require the Railway Company to recognize or to deal with, or confer with labor unions. It does not require employees to deal with their employers through their fellow employees. But we think it does vest the Labor Board with power to decide how such representatives ought to be chosen with a view to securing a satisfactory coöperation and leaves it to the two sides to accept or reject the decision. The statute provides the machinery for conferences, the hearings, the decisions and the moral sanction. The Labor Board must comply with the requirements of the statute; but having thus complied, it is not in its reasonings and conclusions limited as a court is limited to a consideration of the legal rights of the parties.

The propriety of the Board's announcing in advance of litigated disputes the rules of decision as to them is not before us except as to Principles 5 and 15 of Decision No. 119, so far as they determine the methods by which representatives of employees should be selected. They were applied and followed in the form of ballot prescribed by Decision 218. These decisions were necessary in order that conferences should be properly begun under § 301, and that disputes there arising should be brought before the Board. They were therefore not premature. It is not for us to express any opinion upon the merits of these principles and decisions. All that we may do in this case is to hold, as we do, that they were within the lawful function of the Board to render, and not being compulsory, violate no legal or equitable right of the complaining company.

For this reason, we think that the District Court was wrong in enjoining the Labor Board from proceeding to entertain further jurisdiction and from publishing its

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opinions, and that the Court of Appeals was right in reversing the District Court and in directing a dismissal of the bill. We do not find it necessary, therefore, to consider the questions raised at the bar as to whether the Railroad Labor Board is a corporation under the act and capable of suing or being sued, without the consent of the United States, and whether the Board's publication of its opinions in matters beyond its jurisdiction could be properly enjoined by a court of equity.

Decree affirmed.
